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FOREWORD

I am glad to see this book written by one of my own juniors, A. K. Sen. I have gone through this book and I have been deeply impressed by the way in which Mr Sen has brought, within the scope of a single book, all the varied branches of Commercial Law. I am sure this book will prove indispensable not only to commerce students but also to all beginners in the study of law.

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S. R. Das
Barrister-at-Law.

FOREWORD

I have carefully read through *Hand Book of Commercial Law* by Mr A. K. Sen, and I have been very much struck by some of its special features. Apart from the fact that the book presents the whole subject in a handy form, the manner in which difficult subjects have been treated is admirable. The canvas is small, but the picture that the author presents of his subject is distinct. The book is sure to do immense good to students, both serious and casual. To be able to breathe life into the dry bones of Commercial Law is no small feat, and Mr. Sen has achieved it perfectly.

Arun Kumar [Redacted]
(Econ.), London [Redacted]
Vice-Principal, [Redacted]
Commerce [Redacted]

PREFACE TO THE THIRD EDITION

The second edition of this book was very well received and stock was completely exhausted within a year. I, therefore, encouraged to bring out the third edition of this book. The parts on Insurance and Law of Carriage have been altered and recognition and I feel confident that they will be appreciated by students and practitioners alike. A new chapter on Bills and Banking has been added and I am sure it will serve the needs of students and bankers on this subject. The latest decisions both in India and England have been incorporated in this edition. The case of Naresch Chandra Sanyal *vs.* Calcutta Exchange Association referred to in the chapter on Commercial Law has been reported in 49 C.W.N. at p. 502, under the title "Naresch Chandra Sanyal *vs.* Ramani Kanto Ray". As the manuscript of the third edition of this book was already in the press the reference of the case could not be given in this book.

I cannot conclude this introduction without expressing my thanks to many sincere friends, teachers and members of the Bar who have given me valuable help and suggestions.

17 Library Club,
11 Court, Calcutta,
14th July, 1945.

Author

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INTRODUCTION

Nature of Commercial Law :

The Commercial Law of India has been mostly borrowed from English Law. Merchants have long forgotten the pre-British Hindu and Mahomedan law relating to contracts, sale etc. To understand the nature of Indian Commercial Law prevailing today, we have to probe into the genesis of English Commercial Law. The English Commercial Law is a product of history and has grown out of what has long been known as the *Law Merchant* or *Lex Mercatoria*. Nobody has yet been able to trace the actual course through which the *Lex Mercatoria* developed as a distinct body of law recognised by courts of law. But it is sufficient to note here that in its essence and structure it is a body of customs and usages which have been developed in course of the mercantile history of Western Europe, enriched at every stage by copious borrowings from Roman Law and from principles of equity and good conscience. In its growth it has received contributions from every country of Western Europe and it has always been regarded as a *jus gentium* or the law of nations. 'When Butler J spoke in *Master v Miller* (1791), 4 Term Rep 340, of the *lex mercatoria* as a system of equity, founded on the rules of equity, and governed, in all its parts, by plain justice and good faith', when it was said that it was impossible that the maritime laws of any one realm should be sufficient for the ordering of affairs and traffic of merchants'; that the *law merchant* is a law 'whereof all nations do take special knowledge' there was not merely a reference to the absence of technicalities, but to the fact that the same rules of law were generally applied throughout civilised Europe'.¹ Speaking of Negotiable Instruments K. Bhasyam² says, "The origin of these instruments can be traced to the usage and custom of merchants and traders which courts of law have accepted as settled law, in view of the general interests of trade and the convenience of the public." It may be equally said of Commercial Law that it can be traced to the usage and custom of traders and merchants, which has been recognised by statutes and courts of law and has

¹ Smith's Mercantile Law, 18th ed., p. ccviii.

² Bhasyam & Adiga's—The Negotiable Instruments Act, 7th ed., p. V.

been adapted as settled law, in view of the general interests of trade and the convenience of the public.

The term Commercial Law does not lend itself to an easy definition. Taking from the definition in the Rules of the Supreme Court in England, Ch. XII, Rule I of the Rules of the Calcutta High Court (original side)¹ defines commercial suits as follows :—"Commercial suits include suits arising out of the ordinary transactions of merchants, bankers and traders ; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, carriage of goods by land, insurance, banking, and mercantile agency, and mercantile usages, and debts arising out of such transactions." From this we can shape our definition of Commercial Law as follows :—Commercial Law includes the law applicable to the ordinary transactions of merchants, bankers and traders, and denotes that branch of the law which relates to the rights of property and the relations of persons engaged in commerce.

It is also difficult to enumerate what are to be regarded as the different branches of Commercial Law. The same law may relate to commercial as well as extra commercial transactions. The law of contract, for instance, applies to merchants and non-merchants equally. For the sake of convenience the following branches are usually included in Commercial Law :—(a) Law of contract, (b) Law relating to sale of goods, (c) Partnership law, (d) Company law, (e) Law of Insurance, (f) Contract of affreightment, (g) Law relating to carriage of goods by land, (h) Law relating to commercial securities, (i) Law relating to arbitration, (j) Law of Banking and (k) Law relating to negotiable instruments.

History of Commercial Law :

It has already been noticed that Commercial Law grew out of the *Law Merchant*. In England "before the end of the thirteenth century the *Law Merchant* was already conceived as a body of rules which stood apart from the Common Law. But it seems to have been rather a special law for mercantile transactions than a special law for merchants. It would, we think, have been found chiefly to consist of what would now be called rules

¹ Ormond's "The Rules of the Calcutta High Court," p. 396.

of evidence, rules about the proof to be given of sales and other contracts, rules as to the legal value of the tally and the God's penny.¹ These special rules were supposed to have been known to all the merchants. The merchants used to assemble in the fairs and markets of mediæval times and declare the law. The law used to be administered in fairs and markets by mercantile courts composed of merchants. Procedure was informal and justice was summary. The law administered by these courts was purely commercial and influenced by their composition. From the records of these courts we find that "cases turning upon the contract of sale are the most numerous. The contract was generally made by the agreement of the parties evidenced by the gift of a God's penny or earnest money."² We also find cases relating to fore-selling, selling out of the fair, selling without a proper display, or using false measures. Cases of contracts are also numerous. We also come across cases of theft, trespass and assault. The rules obtaining in the fairs were by no means purely English. They were supposed to have been known to merchants throughout Christendom and may as such be considered as *jus gentium* or the law of nations.

The market and fair courts disappeared towards the seventeenth century but the customs and usages developed by them were taken over by the Common Law Courts and gradually absorbed and enlarged. This marks the beginning of the real birth of Commercial Law in England. "By far the larger part of our modern commercial and maritime law is due to the reception of continental doctrines in the sixteenth and seventeenth centuries. In the case of commercial law this reception was effected partly by legislature, partly by the council, and partly by the various courts of law which had jurisdiction in mercantile cases—the Admiralty, the Chancery, the Star Chamber, and the Courts of Common Law. Through these various agencies many new legal doctrines, familiar in the trading centres of Europe, became part of English law, and began to be developed on native lines by the English Courts."³

Commercial Law has not, by any means, reached its last stage. The exigencies of trade are continually expanding and the courts

¹ Pollock & Maitland—History of English Law, p. 467.

² Holdsworth's History of English Law, vol. 5, p. 109.

³ Holdsworth's History of English Law Vol. 5, p. 102.

of the country are not to be slow in according recognition to the expedients devised by traders for satisfying them. The legislature is also alert to initiate statutes to meet the growing needs of commerce and trade

Sources of Commercial Law :

The sources of Commercial Law may be grouped under the following heads –

(a) The collection of maritime usages and customs—These were known as *consuetudines* and were compiled for the use of merchants and lawyers. They commanded great authority in the fourteenth and the fifteenth centuries in Europe. They may be divided into two categories— (i) those which were collected in the Mediterranean ports, and (ii) those which were compiled for the merchants in Northern Europe.

(b) Roman Law. In all difficult cases where custom and usage failed to afford any solution reference was made to Roman Law to cover the deficiencies of the law of every civilised country. “The writers on mercantile law, here (England) and in the continent, sought in Roman Law solutions for difficult and novel problems and often found them.”¹

(c) Equity—Where custom failed and Roman Law afforded no help English judges applied the principles of equity and good conscience. The law relating to disclosure in contracts of insurance and other contracts *uberrimæ fidei* is an example of the point.

(d) The Fair Court—The principles evolved in the fair courts of the mediæval times were gradually absorbed in the body of Commercial Law.

Sources of Indian Commercial Law :

The sources of Indian Commercial Law are the following –

(a) Statutes—Statutes living down law on the basis of English law form by far the most important source of Indian Commercial Law. The Contract Act, The Sale of Goods Act, the Partnership Act, and the Companies Acts are instances of the way in which English Commercial Law has gradually been introduced in India.

¹ Smith's *Mercantile Law*, 13th ed., p. cix.

(b) English Common Law—Where Statutes are absent and where Statutes are ambiguous the Indian Courts of Law are always ready to apply the English law on the subject. Even in interpreting statutes, reference is always made to English decisions.

(c) Indian Custom and Usage—Where there is a universal custom of ancient origin, such custom, unless otherwise excluded, always governs commercial transactions. The law relating to hundies and the law of dampdupat prevailing in Bengal are illustrations on the point.

(d) Equity—Equity in India as in England always gives a residual power to Courts to deal with harsh cases where the ordinary laws fail to give any solution.

Hand Book of Commercial Law

PART I

COMMERCIAL LAW

CHAPTER I

LAW OF CONTRACT

-Contract :

0 The law of contract may be described as the endeavour of public authority, a more or less imperfect one by the Nature of the Law of Contract, nature of the case to establish a positive sanction for the expectation of good faith, which has grown up in the mutual dealings of men of average right-mindedness. Accordingly the Indian Contract Act defines a contract as an agreement enforceable by law. The most characteristic feature of a contract is that it usually creates a right not to thing but to another man's conduct in the future—though some classes of contract like pledge or hypothecation create rights in things. "He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way." The obligation whereby a person will be bound by his promise to another can only be created by an agreement which the law will enforce. We have, therefore, to see what is an agreement and what agreements will be enforced by law.

What is a Contract :

Section 2(h) of the Indian Contract Act defines a contract as an agreement enforceable by law. This definition naturally resolves itself into two distinct parts. First of all, there must be an agreement. Secondly, such an agreement must be enforceable by law. We shall, therefore, proceed to define and analyse all the elements which go to make up an agreement and also the conditions which must be satisfied in order to make such an agreement enforceable and thus to raise it to the status of a contract.

Agreement :

An agreement and a promise are one and the same thing.

According to S. 2(e) of the Indian Contract Act
Agreement and Promise "every promise and every set of promises, forming the consideration for each other, is an agreement."

An agreement or promise "is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or foreborne by some or one of those persons for the use of the others or other of them" Such declaration may take place by (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or (b) an offer made by some or one of them and accepted by the others or other of them. In every case an agreement or promise ultimately resolves itself into an offer or proposal made by one party and accepted by the other. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal or offer¹ When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. When the proposal is accepted the two minds are *ad idem*. A proposal when accepted becomes a promise or an agreement. The person making the proposal is called the "promisor" and the person accepting the proposal is called the "promisee." A says to B, 'will you sell me your land Blackacre for £100?' A is making an offer or proposal. B says, "yes." B accepts the offer. The two minds are *ad idem*. There is a promise or agreement which binds both A and B.

An agreement may be either *express* or *implied*. An *express agreement* is made whenever there is an offer coming from one party which is accepted by the other. Let us take an illustration. A says to B, "Will you sell me your land Blackacre for £100?" B says "yes." In this case A has made an offer or proposal which B has accepted. The two minds are in agreement or *ad idem*, as it is called, at some one time with regard to what is to be done by both or one. An agreement will thus be constituted whenever a person makes an offer and another accepts it as a result of which the two minds are brought in harmony or agreement.

¹ Section 2 (a).

An *implied agreement* differs from an *express agreement* in that in its case the act of offer and the act of acceptance are not clearly expressed either verbally or in writing but have to be gathered from the conduct of the parties or from surrounding circumstances, such as the general course of dealing between the parties or any general or local customs which may fairly be assumed to have guided the conduct of the parties. If A mentions a figure at an auction bid he is deemed in law to have made an offer. If the auctioneer drops his hammer his conduct implies that he accepts A's offer. So also, if the Tada Company runs a Bus in Calcutta from the Lakes to Chamba, which stops to take up and set down passengers, implies that the Company is making an offer to carry any member of the public to any place on the route at the stated fare. If any person gets on the bus he is presumed by law to have accepted the offer to pay the fare which is due for the distance he wants to travel¹.

Offer :

A person is said to make an offer, when he signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such an act or abstinence. An offer becomes complete when it is communicated to the offeree. Without such communication, the offer is of no effect so far as the offeree is concerned.

Sometimes a person declares his intention to make an offer but does not actually make an offer. In this case such a declaration cannot be accepted and thus turned into an agreement. Thus,

Offer distinguished from an intention to make an offer in the case of *Harris vs. Nickerson* - the defendant advertised that he would sell by auction certain furniture at a place some distance from London. The plaintiff went from London to the appointed place and found the sale withdrawn. He sued the defendant for breach of contract. It was held that the defendant's advertisement simply declared his intention to make an offer to any intending buyer. It could not, therefore, be accepted by acting upon it as in the case of *Carlill v. Carbolic Smoke Ball Co.*²

¹ *Payne v. Cave* (1787) 3 TR 148, *Fraser v. City of Glasgow* (1805) 1 KB 808.

² (1893) 1 QB 256.

³ (1893) 1 QB 256.

An offer should also be distinguished from an invitation to make an offer. When a shopkeeper issues a price list or places priced goods in his shop window, he is not deemed in law to make an offer to sell at the named prices or to sell at all. In both cases it is an invitation to intending purchasers to make an offer. Persons asking for tenders do not in the same way make any offer which can be accepted. They simply invite suppliers to make offers which they can accept.¹

An offer must be made known to the offeree to enable him to accept it and form a binding agreement. There cannot be any agreement or acceptance unless the offer has been communicated to the offeree. Thus, if A declared a reward for the recovery of his lost dog, he is not bound to pay any one who finds his dog in ignorance of the reward. The finder in this case cannot be deemed to have accepted A's offer by acting upon it since he had no knowledge of the offer. The finder of the lost dog can only get the reward if he knew of A's offer previously to his so finding.²

It is now a settled principle of law in India that if a man performs the conditions of a proposal made by another in ignorance of the proposal itself, the person who thus performs the conditions of the proposal cannot be deemed to have accepted the proposal and thus to be entitled to any benefit under the contract. In *Lalmon Shukla vs. Gouri Dutt*³ the High Court of Allahabad formally laid down this principle. The Plaintiff in that case was in the Defendant's service as a Munib. On the Defendant's nephew having absconded, the Plaintiff volunteered to search for the missing boy. In his absence the Defendant offered a reward of Rs. 501/- to any one who might bring back the boy. Subsequently the Plaintiff found the boy and claimed the reward. It was proved that the Plaintiff did not know of the offer for reward when he made the search and found out the boy. It was held that the Plaintiff was not entitled to the reward. In this instance the Allahabad High Court, following the recent English decisions, declined to follow the English case of *William vs. Carwardine*,⁴

¹ *Harvey v. Facey*, (1893) A.C. 552

² Section 4.

³ (1930) 11 A.L.J. 489.

⁴ (1833) 4 B. & A. 621.

as an authority for the proposition that if A offers the promise of a reward for an act, and B does the act in ignorance of the offer, B is nevertheless entitled to claim the performance of the promise from A. The principle, in all such cases, is that an offer cannot be accepted, so as to create a binding contract, unless and until the offer has been communicated and brought to the knowledge of the person to whom it is made. This principle is formally laid down in Section 4 of the Indian Contract Act.

An offer can be addressed to any specified individual or to any one belonging to a class or group or to the entire world. To whom can an offer be made. Thus, A may say, "I shall pay £50 to my brother John if he finds my dog" or "I shall pay £50/- to any Catholic who finds my dog," or "I shall pay £50 to anyone who finds my dog."

Revocation of an Offer :

A proposal or offer is revoked in the following manner

1 By the communication of notice of revocation by the proposer to the other party ; 2 By the lapse of time prescribed in such proposal for its acceptance, or if no time is so prescribed, by the lapse of reasonable time, without communication of the acceptance, 3 By the failure of the acceptor to fulfil a condition precedent to acceptance, 4 By the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance

The above rules regarding revocation of an offer have been put in a concise form in Section 6 of the Indian Contract Act. They put in a nutshell the English law on the subject. Let us analyse the rules one by one

1. The proposer may revoke his offer at any time before the offeree has accepted it. The revocation might be in express words in writing or by conduct. But it can be safely assumed that the Indian law is clear on the point that communication of the revocation must be either by the offeror himself or by his authorised agent. There is considerable reason to doubt that the English decision in the case *Dickinson vs Dodds*¹ which laid

¹ (1876) 2 Ch.D 463

WHEN THE revocation of an offer may be complete even if the offeree comes to know of it casually through a stranger, cannot be followed in India in view of the clear language of Sections 3 and 6

2. This rule is now well recognised. When offers are made for a limited time, it is necessary that offer must be accepted within the specified time, otherwise there will be no valid acceptance. Thus if A says to B "I give you the refusal of Blackacre at Rs. 1,000/- for 14 days," this means that A offers the property to B at that price and that the offer is one which is only to continue open for 14 days. Even when no time is fixed, an offer lapses after the expiration of a reasonable time. What is reasonable time depends, in each case, on the nature of the business. A few hours may be a reasonable time in the case of an offer to sell shares; a few weeks and months will not be unreasonable in the case of a sale of land. The principle is illustrated by the English case of *Ramsgate Victoria Hotel Co. vs. Montefiore*¹. In this case Montefiore offered to take shares of the Ramsgate Victoria Hotel Co. on the 8th of June. On 23rd November the company accepted his offer and allotted him shares. It was held that the acceptance by the company of Montefiore's offer should have been made within a reasonable time and that the interval from June to November was not reasonable. It must not, however, be assumed from this case that an interval of 5 or 6 months, would, in all circumstances, be regarded as unreasonable time or that a much shorter time might not in certain circumstances, be found enough to make an offer lapse.

3. It is not clear what this rule means. It was borrowed from the Draft Civil Code of the State of New York. On the face of it, it means that if an offer contains certain conditions, such as acts to be done or forbore by the offeree and if the offeree does anything inconsistent with those conditions, the offer is to be regarded as revoked. It should be noted, however, that such a case should rather be regarded as a rejection of the offer, as acceptance implies the total acceptance of all the terms contained in the offer. It, therefore, appears that this rule is without any utility and has practically no significance.

¹ (1866), L.R. 1 Ex. 109.

4 This rule is quite clear. It follows from the English rule that death of either party before the acceptance causes an offer to lapse. It means that if the proposer dies, or becomes a lunatic, after the offer is made, and the fact of such death or lunacy becomes known to the offeree, the offer is revoked. It differs from the English rule on the subject, in as much as according to English law, an offer is not to be deemed revoked only on the death or insanity of the offeror but that for such revocation it is necessary that the offeree must know of such death or lunacy.

It should be noted that an offer remains in force until it is accepted or revoked or rejected or lapsed by process of time.

Acceptance :

Acceptance of an offer must be *in toto* in order to make a binding agreement. All the terms of the offer must be accepted for the purpose of valid acceptance. In *Jordan vs. Norton*¹ Norton offered to buy Plaintiff's mare must be absolute. Norton offered to buy Plaintiff's mare absolute. It warranted sound and quiet in harness. The terms of the offer were these: (1) offer to buy at a stated price, and (2) such an offer to be operative only if the mare were sound and quiet in harness. Jordan agreed to the price, i.e., accepted the first term. He also agreed to warrant the mare 'sound and quiet in double harness'. He thereby varied the second term by adding the prefix 'double' before 'harness,' which made his acceptance void as regards the second term. This naturally was not an acceptance *in toto* of the offer. It was, therefore, held that such an acceptance could not make a binding agreement. In all cases where an offeree accepts the original offer in an altered form as Jordan did, the so-called acceptance is nothing but a fresh offer emanating from the original offeree. To make this fresh offer a binding agreement the original offeror has to accept the fresh offer *in toto*. Thus, acceptance must be absolute and unqualified².

Law relating to Communication of Acceptance :

Mental assent not followed either by communication or by any action does not make a binding contract. Communication, whether of a proposal or of acceptance or of revocation, consists

¹ (1838) 4 M & W 155

² *Norton* 7

of an act or omission with intent to communicate, or which effectually communicates the proposal, acceptance or revocation¹. In the case of acceptance it must be shown that there was an unqualified intention to accept, evidenced by words or conduct, and a mere intention to accept not shown by words or conduct is insufficient. It was rightly observed in *Brogden vs. Metropolitan Rly. Co.*² 'It is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is.' In *Felthouse vs. Bindley*³. John Felthouse entered into an agreement with his uncle Paul for sale of a horse to him. There was some misunderstanding as to whether the price was to be £30 or 30 Guineas. Finally the uncle wrote offering to split the difference and saying "If I hear no more about him, I consider the horse as mine at £. 30.15.0." John did not answer this letter. Then the defendant, an auctioneer employed to sell John's stock, sold the horse. The uncle contended that it was his, as John by his silence accepted the offer to buy for £. 30.15.0. It was held that, though John may have intended in his own mind to accept his uncle's offer, he did not, in fact, accept, either by communicating his acceptance to his uncle, or by any other overt act.

Modes of Communication of Acceptance :

Communication of acceptance, as has been already observed consists of an act or omission with intent to communicate or which effectually communicates. Such act or omission may be:— (1) oral consent, (2) writing, and (3) conduct. The first two modes of acceptance are simple enough to understand. The third mode of acceptance, namely, acceptance by conduct signifies that mode where a person expresses his acceptance simply by conduct. If A gets up on a bus running from the Lakes to Shambazar (an illustration which we have used before) he signifies by his very act of alighting the bus that he accepts to pay the Bus Company their stated fare for the distance he wants to travel on the route.

Generally the offeree must intimate the offeror his acceptance. But where the offeror expressly or implicitly prescribes the Post Office as his agent, acceptance will be complete as soon as the

¹ Section 3

² 7 A.C. 692.

³ (1862), 11 C.B.N.S. 869.

offeror posts a letter intimating his acceptance, no matter whether the letter actually reaches the offeror or not. It does not mean that simply because the offer was made by post, acceptance will be complete from the moment the letter of acceptance has been posted. The question in every case is whether the offeror has expressly or implicitly made the post office his agent for the purpose of communicating with him. The offeror might also dispense with the necessity of intimation altogether. If the terms of an offer show that it may be accepted by its being acted upon without any communication to the offeror, a person acting on the offer with the intention of accepting thereby is deemed to accept the offer. It was observed by Bowen, L. J. in *Carlill vs. Carbolic Smoke Ball Co*¹, "One cannot doubt that as an ordinary rule of law, acceptance of an offer, made, ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done, the two minds may be apart, and there is not that consensus which is necessary to make a contract. But there is this clear gloss to be made upon that doctrine, that, as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with the notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding it is only necessary for the other person to whom such offer is made, to follow the indicated method of acceptance: and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of that condition is a sufficient acceptance without notification."

In the above case *Carbolic Smoke Ball Co* offered by an advertisement to pay £100 to any one who contracted influenza after using one of their carbolic smoke balls for a fortnight. Mrs. Carlill used one for a fortnight. Having contracted influenza, she sued for £100. Held, that the terms of the offer showed that it could be accepted by using the smoke ball and that communication of performance was a sufficient communication of acceptance, and Mrs. Carlill was entitled to £100.

Sec. 4 of the Indian Contract Act lays down the law regarding communication of acceptance. The communication of acceptance is complete so as to bind the proposer as soon as it is put in a course of transmission to him by the acceptor so as to be out of the power of the acceptor. Posting a letter of acceptance is an instance on the point. On the other hand, communication of an acceptance is complete so as to bind the acceptor when it actually reaches the proposer.

Revocation :

It has already been stated that an offer may be destroyed before acceptance by revocation. It is necessary to say here a few words about revocation of an acceptance. We have seen above that under Sec 4 of the Contract Act an acceptance is deemed to be communicated so as to bind the proposer as soon as it is put in a course of transmission to him by the acceptor ; but it is deemed to be communicated so as to bind the acceptor, only when it actually reaches the proposer. Now in the case of an offer, an acceptance also can be revoked before it is communicated. So the result is that where an acceptance is made by post, the proposer becomes bound as soon as the letter is posted, since the very posting of the letter of acceptance amounts to communication so far as he is concerned and he cannot thereafter revoke his offer ; but the acceptor can at any time before his letter actually reaches the proposer, revoke his acceptance, since in his case the communication is not complete till his letter reaches the proposer.

In this respect Indian law is different from English law, according to which an acceptance, once made, cannot be revoked.

It has already been stated that a revocation in order to be effective must be communicated to the other party.

Communication of revocation Now, the law regarding this communication of revocation has been laid down in Sec 4 of the Contract Act. The communication of revocation is complete so as to bind the person who makes it when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ; it is complete so as to bind the person to whom it is made, when it actually reaches him. Thus, B accepts A's offer by a letter sent by post. Here, A (proposer) becomes bound as soon as B posts his letter of

acceptance. But suppose B revokes his acceptance by a telegram which reaches A before the letter of acceptance. The revocation becomes effective as against A when he receives B's telegram. Now B does not become bound by his acceptance before his letter reaches A. Therefore, his revocation becomes effective as his telegram revoking his acceptance has reached A before his letter of acceptance.

Conditions necessary to make an Agreement a Contract i.e., an Agreement Enforceable by Law :

The formation of an agreement, as explained above is by no means the last step in the creation of a valid contract. It is in fact the first step towards the formation of a valid contract. The following two conditions must be fulfilled to make an agreement a valid contract namely (1) The parties must intend to create legal obligations and (2) There must be consideration to support the offer.

Intention to create legal relation :

The parties must intend to create legal obligations. An agreement which is not intended by the parties to be legally enforceable contract is not a binding contract. The absence of such an intention may be evidenced (i) by express provision or (ii) implicitly by the relationship of the parties or the nature of the subject matter of agreement.

In the case of business dealings between parties an intention to create legal relations is presumed by law. In the case of agreements relating to social engagements on the other hand, any intention to create legal relations is presumed to be absent, e.g., if A invites B to dinner and B accepts this agreement, it cannot be enforced unless it can be proved that A and B intended to create legal relations. In both the above cases however the parties can expressly provide to the contrary.

Consideration :

There must be Consideration for the offer. The following description of Consideration was given by the Exchequer Chamber in 1875 in the case of *Currie v. Misa*¹. A valuable consideration

¹ (1875) L.R. 10 Q.B. at p. 162

in the sense of law may consist either in some right, interest, profit, or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other." The second branch of this judicial description is as pointed out by Sir Frederick Pollock really the more important one. For consideration means not so much that one party is profited as that the other abandons some legal right in the present or limits his legal freedom of action in the future, as an inducement for the promise of the first. It does not matter whether the party accepting the condition has any apparent benefit thereby or not. It is enough that he accepts it and that the party giving it does thereby undertake some burden or lose something which, in the contemplation of law, may be of value. An act of forbearance by one party or the promise thereof, is the price for which promise of the other is bought and the promise thus given for value is enforceable.

Thus consideration may consist in (1) a promise made by the promisee to the promisor to do or forbear from doing something. If A promises to sell his house to B for Rs. 50/-, in consideration of his promise to pay Rs. 50/- three months hence, the consideration of A's promise is only a promise from B to do something in the future. In such cases the consideration which is itself a promise is said to be executory. (2) Something done or foreborne or some detriment or loss suffered by the promisee at the request expressed or implied of the promisor. If A offers B Rs. 10/- provided B runs from Dum Dum to Calcutta, there will be no consideration for A's promise even though B accepts the offer unless and until B has actually run from Dum Dum to Calcutta. B, by running from Dum Dum to Calcutta, executes the consideration which makes A's promise a binding contract. A consideration of this kind is called an executed consideration.

It is a settled principle of English law that a promise not made by deed is not a valid contract unless it is made for valuable consideration. If A promises to pay B £100, B cannot enforce the promise against A as there is no consideration for A's promise. In the absence of consideration it can only be enforced if B's promise is made by a deed under seal. But suppose A offers to give £100 to B in return

for a car given by B to A. Giving of the car is said to be the consideration for A's promise,—it is a benefit which A gets in return for his promise. It would be the same if A promises to pay £100 if B will promise to give his motor car in return. In this case, as noted before, the consideration for a promise is a promise and B, by accepting the offer, can compel A to perform the contract and if A fails, to sue him for breach of contract.

There are certain rules regarding consideration in English law :—(1) Consideration need not be adequate. This means that the court will not enquire whether the consideration in a particular case, that is, what has been done, foreborne or promised, is equivalent in value to the promise of the promisor. The minutest consideration is enough provided it has some value in the eye of law. Thus if A promises to pay £100 to B for an old stamp which B gives to A, it will be no defence of A in answer to B's claim that the stamp in actual fact was of a much smaller value.

(2) Consideration must be real and not sham. This means that the consideration must be of real value and not one which is only of apparent value. Thus if A promises to pay B £100 in consideration of B's promise to take him to the moon, the consideration is sham and not real as B's promise is absurd. Similarly, suppose A owes B £100 and A offers to pay £90 down in full settlement. B accepts and A pays £90 in full settlement. Nevertheless, B can sue for the unpaid balance of £10 as his promise to accept £90 in full settlement of a debt of £100 is really a promise to forego his claim to the odd £10, and there is no consideration for that. But now, suppose that A's debt is payable in future, say 3 months hence, and A offers £1 down. If B takes this, there is consideration for his giving up odd £99 *viz.*, his getting £1 three months sooner than he is entitled to it.

3. Consideration must not be illegal. This means that any promise or act or forbearance which is against law or public policy cannot be the consideration for another promise.

4. Consideration must not be past. A past consideration, that is one which is wholly executed before the promise, is insufficient to support a subsequent promise. Thus, if I offer Rs. 10/- to B, if he will run from Dum Dum to Calcutta, when B, by actually running from Dum Dum to Calcutta, will simul-

be bound to pay him Rs. 10/-. But if I promise B Rs. 10/- in consideration of his having run from Dum Dum to Calcutta last week, the consideration is past. It is something done before the offer and such consideration will not be able to support a binding contract in English law.

5. Consideration must move from the promisee, i.e., consideration must move from the party entitled to sue on the contract. This rule is expressed by the maxim 'No stranger to the consideration can sue on the contract.' Suppose A promises to pay money to C in consideration of B's promising to build a house. B builds the house. C cannot sue A on the promise because he has neither done nor foreborne, nor suffered anything, nor made any promise in return for A's promise.

According to the Indian Contract Act consideration has been Indian Law. defined as follows¹:

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise." On the face of it, this definition makes a departure from the English law on two fundamental points, viz., (1) the words "promisee or any other person" implies that consideration may move either from the promisee or from some one other than the promisee. Thus in Chionya vs. Ramya² the facts were as follows :

A, by a deed of gift, made over a certain property to her daughter on condition that the daughter should pay an annuity to A's brother as had been done by A. On the same date the daughter executed in writing in favour of the brother agreeing to pay the annuity. The daughter having declined to fulfil her promise, the brother sued the daughter to recover the amount due under the agreement. It was contended by the daughter that no consideration proceeded from the brother and that he, being a stranger to the consideration, had no right to sue. It was held that the consideration indirectly moved from the brother to the daughter and that he was, therefore, entitled to maintain the suit. But though consideration may move from a third party,

¹ Section 2 (d).

² (1891) 4 Mad 137.

it should be remembered that a person who is not a party to the agreement cannot sue on the agreement.

(2) The words 'has done' or 'abstained from doing' declare the law to be that an act done by A at B's request without any contemporaneous promise from B at the time, may be a consideration for a subsequent promise from B to A. This clearly shows that in India past consideration is a good consideration. Thus in *Sindhi v. Abraham*¹, the Plaintiff rendered service to the Defendant at his desire expressed during his minority and continued doing him service at the same request after his majority. The question arose whether such service constituted a good consideration for a subsequent expressed promise by the Defendant to pay an annuity to the Plaintiff. It was held that the agreement which was for compensating for past services rendered, was a valid one under Section 2. of the Indian Contract Act. *given full m*

The Indian law regarding consideration also differs from the English law in that certain agreements without consideration are nevertheless, valid. These agreements are (1) a gratuitous promise is binding if it be in writing and registered and if it be made on account of natural love and affection between parties standing in a near relation to each other. (2) A gratuitous promise is also binding when it is a promise to pay a time-barred debt, though without any consideration, provided the promise is in writing and signed by the promisor or his duly authorised agent. (3) A promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, is enforceable, even though it is without consideration. (4) A promise to compensate fully or in part a person who has already done something voluntarily which the promisor is legally compellable to do, is a valid contract.

Exception to the rule "no Consideration no Contract."

Section 25 of the Indian Contract Act makes a significant departure from the English law in that it dispenses with consideration in the following cases of contracts which are valid and binding, even though they are made without consideration.

1 Where the contract is expressed in writing and registered under the law for the time being in force for the registration

of documents and is made on account of natural love and affection between parties standing in a near relation to each other. This naturally forms an exception to the rule that a mere gratuitous promise is void. It states that a gratuitous promise made for natural love and affection by parties standing in a near relation to each other is valid, unless, of course, it is induced by fraud or misrepresentation. In every case, however, natural love and affection has to be proved and parties standing in a near relation to each other, do not necessarily imply 'mere relatives.' Thus in *Mrs. X, vs. Mr. X.*¹ a promise by the husband to provide main-
tenance to the wife was declared void, as it was obvious in that case that no natural love and affection existed between the husband and the wife. It should be remembered that a gratuitous promise under this provision can only be enforced provided it is in writing and is registered.

2. Where the contract is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor. A finds B's purse and gives it to him. B promises to give A £50. A can enforce the promise. It should be remembered in this connection that past services rendered *at the desire of the promisor* is a good consideration under Section 2 of the Indian Contract Act. But this Section (S. 25) deals with past services rendered voluntarily and provides that, though such services do not form a good consideration, yet a promise based on it is nevertheless enforceable. Thus in *Kalipada vs. Durgadas*² it was held that where certain services were rendered by a pleader, on request and in pursuance of an agreement to pay a certain remuneration, the services rendered not being voluntary, the agreement could not be treated as a promise to compensate under this section, but an agreement based on good consideration under Section 2.

3. Where the contract is a promise to compensate, wholly or in part, a person who has already voluntarily done something which the promisor was legally compellable to do. A supports B's infant son. B promises to pay A's expenses in so doing. As the promise is based on A's voluntarily doing something which B was legally compellable to do, A can enforce the promise.

4. Where the contract is a promise to pay a time-barred debt without consideration, provided the promise is in writing and signed by the promisor or his duly authorised agent. According to the statute of limitation a debt cannot be recovered by the creditor after the period of limitation has expired, unless the debtor or his authorised agent acknowledges the debt or makes payment either towards principal or interest before the expiration of the period of limitation¹. But this Section gives the creditor the right to enforce payment of the debt, even after the expiration of the period of limitation and even in the absence of acknowledgment or payment provided the debtor or his duly authorised agent promises in writing after the expiration of the period of limitation to pay the debt. The subsequent promise in this case, though without consideration is valid and enforceable.

Where the contract is a promise to appoint an agent according to the Section 185 of the Indian Contract Act, the contract of agency requires no consideration.

Other Elements of a Valid Contract :

According to Section 1 of the Indian Contract Act a contract is valid when (1) the parties to it are competent to contract, (2) the agreement is brought about by free consent and (3) the consideration and object are lawful.

1 Parties Competent to Contract :

1. Every person is not competent to enter into a valid contract. Thus, contracts entered into by (a) minors and (b) persons of unsound mind are void.

Contracts by Minors :

According to the English law a minor is a person who is below the age of 21 years. In the common law of England an infant's contract was either valid or voidable. It was valid when it was for necessities and for the benefit of the infant. It was voidable at the option of the infant when the contract was neither for necessities nor for the benefit of the minor. Thus an infant was, by common law, liable to pay for necessities sold or delivered to him, and this was also stated by the English Sale of Goods Act, 1893. Necessaries, in every case, mean goods suitable to the conditions of life of such

¹ Sections 19 & 20 of the Indian Limitation Act.

infant and to his actual requirements at the time of the sale and delivery. What are necessaries is decided in every case by the court after an inquiry into all the circumstances of the case, such as social status, the requirements and other things concerning the minor In Nash v. Inman¹, the facts were as follows :

A tailor supplied an undergraduate of Cambridge who was an infant, with a few velvet suits. The father of the undergraduate deposed that at the time his son was amply provided with such suits. The Court held that the suits supplied were not to be considered necessaries as there was no need for them at the time in question, and, therefore, the minor was held not liable to pay for them. An infant was also similarly liable to pay a reasonable sum for his education or for instructions in a trade suitable to his conditions in life and he was also bound by a contract to serve for wages, provided it was, as a whole, for his benefit at the time when it was made.

But after the passing of the Infants Relief Act 1874, an infant's contracts in England are now divided into three classes.

(1) Void, (2) Voidable and (3) Valid

(1) *Void* Under the Act the following three classes of contracts have been declared absolutely void

(a) Contracts for re-payment of money lent or to be lent

(b) Contracts for goods supplied or to be supplied excepting necessaries, and

(c) Contracts on accounts stated

(2) *Voidable* : There are certain contracts which are valid and binding on the minor until he avoids it, either during his minority or within a reasonable time after the attainment of majority. These are contracts which relate to sale or lease of immoveable properties and partnerships.

(3) *Valid* . As by common law, so also under the Act an infant can enter into a valid contract for necessaries and for his benefit

According to Indian law the age of majority is now regulated by the Indian Majority Act of 1875. According to the Act, every person shall be deemed to have attained majority when he shall have completed the age of 18 years and not before. In the case, however, of a minor of whose

person, or property or both a guardian has been appointed by a Court, or of whose property the superintendence is assumed by a Court of Wards, before the minor has attained the age of 18 years the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of 21 years. According to the Indian law, a person who has not attained majority is called a minor and not an infant,—which is the term used in English law.

Unlike English law, the Indian Contract Act¹, declares that all contracts by minors are absolutely void, excepting contracts for necessaries and for his benefit. This is confirmed by the decision of the Judicial Committee of the Privy Council in the case of *Mohori Bibi vs Dhundas*.² Exception, however, to this rule is provided by contracts for necessaries and for the benefit of the minor in respect of which the law is the same as in England, excepting for one fundamental difference. The difference is that while in England under such contracts the minor is personally liable, in India it is not the minor but his estate which is liable.

Certain rules of exception have, however, to be noted in addition to what has been referred to above. Firstly, though a minor cannot enter into a valid contract excepting for necessaries and for his benefit yet an agreement entered into by a competent person on his behalf can be validly enforced by him and against him. Thus a minor's property can be sold or leased out by his guardian and the minor, in all such cases, is bound by it unless, of course, it is proved that the guardian was acting adversely to the interest of the minor. Secondly, according to some decisions of the Allahabad and Madras High Courts it has been held that, if a minor makes a contract by fraudulently representing to the other party that he has attained majority, he may be estopped by Section 115 of the Indian Evidence Act³ from setting up that he was a minor when he entered into the contract. But the Calcutta High Court tends to incline to the view that the doctrine of Estoppel does not affect Section 10 of the Indian Contract Act, whereby all contracts of a minor have been declared void except in the cases already referred to. It seems that the Calcutta High Court is right, for, in a body of codified law no one enactment

¹ Section 10

² 30 Cal 539

should be so construed as to render the express provision of another enactment absolutely nugatory. This view is confirmed by the decision of the Lahore High Court in *Khangul or Lakha Singh*¹.

Contracts by persons of unsound mind :

(b) Lunatics and drunken persons are generally regarded as persons of unsound mind. Contracts entered into by a person during his lunacy or drunkenness are void. But a contract entered into by a lunatic when he is sane and sober and is perfectly capable of forming a rational judgment on the contract, is valid.

2. Free Consent :

Two or more persons are said to consent when they agree upon the same thing in the same sense. A agreed to buy of B 125 bales of Surat Cotton to arrive ex *Peerless* sailing from Bombay. There were two ships named *Peerless* sailing from Bombay and A had in his mind one of these ships B the other. It was held that there was no contract as the parties did not agree upon the same thing in the same sense. A consent is said to be not free when it is caused by any one of the following—(A) Coercion, (B) Undue influence (C) Mistake (D) Misrepresentation, and (F) Fraud.

(A) Coercion :

An agreement is said to be induced by coercion when one party compels the other to enter into the agreement by (i) committing or threatening to commit an act punishable by the Indian Penal Code, or (ii) detaining or threatening to detain unlawfully any property to the prejudice of any person¹. A says to B—"I shall set fire to your house unless you agree to sell the house to me for Rs 1000." B says, "All right, I shall sell you my house for Rs 1000/-." This is obviously an agreement caused by coercion and A will not be allowed to enforce the agreement against B. B has the right to treat the contract as void. But if B finds it profitable to sell the house he can compel A to perform the contract. The person using coercion has no right on

¹ (1921), 9 Lah 701

² Section 13

³ *Ramsay v. Wichelhaus* (1864) H & C, 906

⁴ Section 15

the contract. But the person coerced has the right to treat the contract either as void or as binding. Contracts induced by coercion are thus voidable at the instance of the person coerced.

It should be noted that it is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed. The following example given by the Indian Contract Act¹ will make it clear :

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. A afterwards sues B for breach of contract at Calcutta. A has employed coercion, although his act is not an offence by the law of England, and although sec. 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

(B) Undue Influence :

A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other².

Domination over the will of another is inferred in the following circumstances :—

- (i) Where a party holds a real or apparent authority over the other, *e.g.*, a father in relation to his child.
- (ii) Where a party stands in a fiduciary relation to the other, *e.g.*, a solicitor in relation to his client.
- (iii) Where a person makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress, *e.g.*, a doctor entering into contract with his patient.

All contracts caused by undue influence are voidable at the option of the party over whom the undue influence is exercised. Where such a relationship exists between the parties as would normally lead to the inference that one party is in a position to dominate the will of the other, the next question to be decided is whether the contract is unfair for the latter. If it is unfair.

the presumption will be that the contract was caused by the exercise of undue influence. The burden of proving that no such influence was exercised will rest on the former. The following examples will clearly illustrate contracts brought about by the exercise of undue influence.

- (a) A having advanced money to B, his son, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.
- (b) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

There are cases, however, which should be carefully distinguished from cases of undue influence.

- (c) Thus, A applies to a banker for a loan at a time when money is very scarce. The banker declines to give the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

(C) Mistake :

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void¹. Mistake nullifies consent but only when the following conditions are satisfied

- (i) Both the parties are suffering from the mistake. Mistake on the part of one of the parties only does not make a contract void. If A purchases B's horse for £500/- thinking that it had won the Derby race without B ever having induced the belief, the contract will not be void. The mistake was only unilateral.
- (ii) The mistake must be as to an essential fact. Mere mistake as to any important particular, or any collateral circumstances or mistakes of judgment or value will not make a contract void. The following

¹ Section 20

may be cited as instances of mistake as to an essential fact of the contract.

(a) The parties may be mistaken as to the identity of the contracting parties. A lady comes to a jeweller's shop and represents herself as Mrs. X. If the jeweller contracts to sell any jewel to the lady the contract will be void from the very outset as the contract is purported to be between the jeweller and Mrs. X and not the lady¹.

(b) The parties may be mistaken as to the identity of the subject matter about which they are apparently agreeing. A agreed to buy from B Surat Cotton "to arrive ex Peerless from Bombay." There were two ships named *Peerless*, sailing from Bombay and A had in his mind one of these ships, B the other. It was held that as there was a mistake as to the identity of the subject-matter of the supposed contract, there was no contract at all².

If the mistake is as to the quality of the thing contracted for, the mistake will only affect consent if it is a mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. A common mistake as to some quality which only makes the thing more or less valuable than it was supposed to be will not invalidate the contract. A buys a picture which both the buyer and the seller believe to be the work of an old master. The buyer pays a high price. It turns out that the picture is only a modern copy. The contract will stand in the absence of misrepresentation.³

(c) The parties may be mistaken as to the basis of the contract. Thus, if the parties enter into a contract for the sale of some specific article, the existence of that article is the foundation of the contract. If it turns out that the article had perished before the contract, it will be void.

(D) Misrepresentation and Fraud :

We have seen above that a mistake makes a contract void.

¹ *Lake vs. Simmons*, (1927) A.C. 487 (For fuller discussion, see post).

² *Raffles v. Wichelhaus*, (1864) H. & C., 906.

³ See Misrepresentation, *infra* p. 26.

Such mistake is common to both the parties. It is not induced by one to mislead the other. But it is not uncommon to find one party inducing the other to enter into the contract by making a false statement which he himself may believe or disbelieve. A says to B that his horse is healthy and that B might have it for £50/-. B relying on the statement of A that his horse is healthy buys the horse for £50. It turns out that the horse is not healthy. If A himself believed that the horse was healthy it will be a case of innocent misrepresentation. If he did not believe so, it will be a case of fraudulent misrepresentation or fraud. In both cases B is entitled to treat the contract as not binding on him i.e., the contract is voidable at the option of B. If he has not paid the purchase price he can refuse to pay it and ask A to take the horse back. If he has paid the price, he can ask A to take his horse back and refund the purchase money. Let us treat Misrepresentation and Fraud separately. It should, however, be noted that a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised or to whom such misrepresentation was made, does not render a contract voidable¹

Fraud :

Section 17 of the Contract Act states that Fraud means and includes any of the following acts committed by a party to a contract, or his agent, with intent to deceive another party or to induce him to enter into the contract.

(1) The suggestion as a fact, of that which is not true by one who does not believe it to be true. A tells B knowing it to be false that his colt is of pure Arab breed. On this suggestion B agrees to buy the colt for Rs. 500. The contract is voidable at the option of B on account of fraud.

(2) The active concealment of a fact by one having knowledge or belief of the fact. It is fraud for one to conceal material facts which he is under an obligation to disclose when he is entering into a contract with another. This duty to disclose does not arise in cases of all contracts. It arises only in the following cases.

(i) Statutory obligation to disclose :—Certain statutory provisions require parties to a contract to make dis-

¹ Section 19.

closure of material facts. Thus, Section 55 of the Transfer of Property Act requires a seller of real property to disclose all defects as to his title or property to the buyer. Therefore, if in contravention of this provision the seller conceals any defect in his title and tells the buyer that his property is free from all incumbrances, the buyer may treat the contract as void even if he buys the property, in case the property turns out to be mortgaged or subject to similar incumbrances.

- (ii) Duty to disclose arising out of *Uberrimae fidei* (utmost boundint faith). Where parties to a contract stand in such a relationship that utmost good faith is required of them, they must disclose all material facts. Family settlements or compromise of disputes, contracts between solicitors and clients, or between doctors and patients or between father and son, or between a trustee and *cestui que trust* are illustrations of contracts of this type wherein the parties must disclose all material facts.

Duty to disclose material facts in contract of insurance, e.g., Life Assurance or Fire and Marine Insurances, is also enjoined on the party assured by the Insurance Act. The reason for this is that only the assured knows all facts relating to the risk undertaken by the Insurance company e.g., details about illness, age and so on of the party assured. If the material facts are not disclosed, the company is entitled to treat the policy as void.

In all other cases of contracts where there is no duty to disclose cast on the parties, the parties must take care of themselves. Thus, in ordinary contracts of sale the buyer must take care of himself. The seller is under no obligation to disclose material facts. A sells his horse to B for ₹50. A knew that the horse was ill. But he never made any representation to B to the effect that his horse was not ill. His concealment of his horse's illness will give B no ground to treat the contract as void, for A had no duty to disclose material facts. B ought to have verified facts for himself. This is what is known as *Caveat Emptor*, i.e., "buyer beware."

(3) A promise made without any intention of performing it :
—If a party to a contract makes a promise, which he has no intention of performing, with a view to inducing the other party

to enter into the contract, he commits fraud. B gives A Rs. 100/- on A's promise to draw a portrait for him. A has no intention to draw the portrait. A is guilty of fraud.

(4) Any act or omission which the law specially declares to be fraudulent - Certain statutes declare certain acts as fraudulent. Thus, any transfer of immovable property made with intent to defraud creditors is declared fraudulent by the Transfer of Property Act.

(5) Any other act fitted to deceive.

(6) Silence is Fraud — Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silent to speak, or unless his silence is in itself equivalent to speech. B says to A, "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech. If in this case B buys the horse and finds that the horse is unsound, he can impeach the contract for fraud which in this case was A's silence.

Misrepresentation :

We have seen before what is the essence of misrepresentation. Misrepresentation means and include

(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true. A tells B that his land produces 1000 bushels of wheat. On that representation B buys the land. It turns out that the land produces only 800 bushels of wheat. But A believed that it produced 1000 bushels of wheat though he had no reason to believe so on the information he had. B can treat the contract as void for misrepresentation. But if A had good reasons to believe in his statement on the information he had, it would not have been a case of misrepresentation. It would have been a case of mutual mistake.

(2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him. We have seen before that in a contract of insurance the person assured has a

duty to disclose his age etc. If the assured on an honest belief states his age as 25 whereas he is really 27 and thereby obtains a lower premium, it will be a case of misrepresentation by breach of duty without an intent to deceive.

(3) Causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. Mistake induced by one party to the contract as to the main subject matter of the contract makes the contract voidable at the option of the other party even if that inducement was innocent. Mistake about any particular matter not forming by itself the subject matter of the contract will only amount to a breach of warranty¹ but not to misrepresentation. A says to B "My house is free of any defect." B buys the house. A did not know that there was a severe crack in the foundation of the house the existence of which makes living in it house dangerous. If and when B finds out the defect, he can treat the contract as void for misrepresentation as the defect vitally affects the house which is the subject matter of the contract. If, however, instead of the defect now mentioned, only one window was broken, B could not have treated the contract as void, for the broken window is not one which vitally affects the subject matter of the contract. It would only amount to breach of warranty.

Effect of Misrepresentation and Fraud—The effect of both misrepresentation and fraud is that the party, on whom fraud has been practised or to whom misrepresentation has been made, can either treat the contract as void or compel the other party to perform his part of the contract. In case of fraud the party injured is entitled to damages for fraud over and above his remedy of treating the contract as void.

Void, Voidable and Unenforceable Contract :

A contract is said to be void when what is alleged to be the contract does not confer any right or impose any obligation on either party. It is, therefore, a little illogical to talk of void contracts, for what is supposed to be the contract

is no contract at all. It is however, conveniently used to describe those cases where there is an apparent contract, but it will not have any legal effect, either because some essential

¹ For discussion of Warranty see *infra* under Sale of Goods.

is lacking on because it is vitiated by being contrary to some law or public policy

A void contract should be distinguished from an illegal contract. Both are void and unenforceable, but in the case of an illegal contract collateral transactions connected with the main contract are vitiated, whereas in the case of void contracts, collateral transactions are not affected at all. Thus, if I advance a man money to enable him to purchase enemy goods, I cannot recover the money. A contract to buy enemy goods is illegal. My advance was collateral to this main illegal contract. Therefore, though advancing money as a loan is a valid contract, yet in this case it is void, as it is collateral to an illegal contract. But if I advanced the money to enable the man to bet on a horse race, I could have recovered the money. Betting on a horse race is void but not illegal. Therefore this advance is collateral to a void contract and not to any illegal contract and it such can be recovered.

A contract may be void due to mistake, illegality of its object or such object being contrary to the public policy and incapacity of the parties and so on.

A voidable contract is one which one party has a right to treat as void if he so chooses but it is valid unless and until he does so. The most common example of a voidable contract is one where one of the parties has been induced to enter into an agreement by misrepresentation or fraud. Thus, if A fraudulently represents himself to be a big businessman and induces B to sell him certain goods and to give him delivery on credit, B may if he so chooses, avoid the contract which he was induced to enter into by fraud. But until and unless B so exercises his option, any bonafide purchaser who buys the goods from A without notice of the fraud, will acquire a good title over the goods¹. This brings to sharp relief the distinction between a void and voidable contract. For if in the above case B delivers the goods under a mistaken belief that A is Lord Halifax, and A sells these goods to D, a bonafide purchaser for value without notice, D will have no title to the goods and B can still recover the goods from him. The reason is that the contract between A and B was void from the

¹ *Phillips v. Brooks* (1919) 2 K.B. 243

very start due to a mistake as to the identity of the parties, and, therefore, A had never any title over the goods which he purported to sell to D¹. In the first case there is a contract until avoided by the party entitled to avoid it. In the second case there has never been any contract at all and neither party had any right or obligation under it.

According to Section 10 of the Indian Contract Act all agreements are contracts if they are made by the parties competent to contract, for a lawful consideration and with a lawful object. This means that an agreement becomes a contract when these conditions are satisfied.

But even where all these conditions are satisfied, under certain circumstances, the courts will not enforce contracts otherwise valid. These are (1) a contract made on account of natural love and affection between parties standing in a near relation to each other will not be enforced unless it is made in writing and registered. (2) a contract made between persons whereby one agrees to re-pay time barred debt which was originally due to the other, will not be enforced unless it is in writing and signed by the party making the promise or by his duly authorised agent. and (3) a contract between parties to refer their present or future disputes to arbitration will not be enforced unless it is made in writing. (4) Contracts made by companies will not be enforced unless it is made in writing. (5) By the Transfer of Property Act all mortgages, other than equitable mortgages, where the principal money secured is Rs 100 or upwards, and gifts of immovable property must be made in writing and registered. In default they will not be enforced.

Void Contracts :

A contract becomes void in the following cases

(i) *Mistake* We have seen before how different types of mistakes render a contract void *ab initio*.

(ii) *Illegality of promise or consideration* Illegality makes a contract void. A contract is illegal if the consideration or the promise involves doing something illegal or contrary to public policy. A says to B "I shall pay you Rs 500 if you murder C". Here there cannot be any valid agreement as the consideration

¹ *Cundy v Lindsay* (1878) 3 AC 459
Section 23

of A's payment of Rs. 500 is B's act of committing a murder, which is illegal.

(iii) *Illegality of object*¹: Object of contract means the purpose for which the contract is entered into. Now it may quite happen that the object of a contract is unlawful, whereas its consideration is lawful. A takes the lease of a house belonging to B for Rs. 50 a month. There is nothing unlawful in this. But A intends to use the house to hold seditious meetings. The contract is unlawful and void as the object of the contract is unlawful.

The following may be regarded as unlawful objects :—

(a) When the object of an agreement is in contravention of any statute, or opposed to the provisions and intent of any Act, it becomes illegal². It is unlawful for a person to draw Hundis on himself payable to bearer on demand according to S. 31 of the Reserve Bank Act. If any one contracts to draw such Hundis in contravention of this Act, the contract will be illegal and void.

(b) A contract with the object of defrauding others is illegal and void. P has a patent right for a certain process in England. B enters into a contract with P for securing the sole agency for working the process in Berlin. B knew he could not exercise this sole agency right in Germany. The object of the contract was to induce share holders to buy shares in a company by representing that B had the right contracted for. As the object of the contract was to defraud share-holders, the contract was illegal and void. - *Begbie vs. Phosphate Sewage Co.*³

(iv) *Object contrary to public policy*: Contracts having as their purpose objects which are contrary to public policy are void because they are looked on by courts of law with disfavour as being detrimental to public welfare and morals.

(v) *An Agreement in restraint of marriage*: Any contract which has as its object the restraint of any adult person from marrying is void as being against public policy⁴.

(iv) *Agreement in restraint of legal proceedings*: Any agreement purporting to take away from any person his right to seek

¹ Sec. 23

² *Ibid*

³ (1875) L.R. 10 Q.B. 449.

⁴ Section 26.

remedy in a court of law is void. An agreement to refer disputes to arbitration is not, however, void¹

(vii) *Agreement in restraint of trade* —

Agreements in restraint of trade are generally one of the following varieties

(a) Agreements restraining a party to a contract from pursuing his occupation after termination of partnership or apprenticeship articles or contracts of service

(b) Agreements restraining a person selling the goodwill of his business from carrying on a similar competitive business

(c) Agreements by which the persons voluntarily curb their rights to regulate the prices or the mode of carrying on their business by entering into a joint agreement amongst themselves. Such agreements are illustrated by the formation of Syndicates or Trusts like the Bengal Bus Syndicate

(d) Agreements by workmen to regulate their wages and their conditions of work by Trade Unions set up by themselves.

Even as late as in the reign of Queen Elizabeth all restraints of trade, whether general or partial, for whatever purpose, were

English Law held to be contrary to public policy and, therefore, void. In course of time however, with the growth of industry and trade, as a result of industrial and commercial revolution, it was found that certain restraints of trade are necessary and that it would interfere with everyday transactions, if such restraints could not be imposed. It stands to reason that nobody would buy the goodwill of a business unless he had the right to restrain the seller from setting up a competitive business under the same name subsequently, nor would an employer feel safe to employ a person in a position where he would know all the secrets of the business of his master unless the master had the right of protecting himself against his employee's use of the secrets he had learnt, after the employee had left his master's employment. Hence the law in England regarding restraints of trade has been relaxed considerably in recent times and any restraint of trade, which is reasonable, having regard to the interests of both the parties and is not injurious to the public, is valid. In all cases the court decides the question of reasonableness by

¹ Section 28

² *Colgate vs. Bacher*, (1602), Cro. Eliz. 872

defendants having failed to perform their part of the contract, he sued them to recover Rs 900/- being the amount advanced by him to the workmen. The agreement was held void under Section 27, though the restriction put on the plaintiff's business was limited to particular place and seemed quite reasonable. As a whole the agreement was void and there was no consideration for the agreement on the part of the defendant to pay the money and the whole contract was held to be unenforceable. This case illustrates the great difference between the Indian and the English law on the subject.

✓(viii) Contracts by way of wager

In *Carlill vs. Carbolic Smoke Ball Co.*¹ Hawkins, J. defined a contract by way of wager as follows: "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake, neither of the contracting parties having any other interests in that contract than the sum at stake he will so win or lose, there being no other real consideration for the making of such contracts by either of the parties." It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose or may lose but cannot win, it is not a wagering contract. Thus if A contracts with B to the effect that A would pay B Rs 50/- if the horse X wins in the race and B would pay A Rs 50/- if the horse fails to win in the race, the contract is a typical example of a wager. For A will win on the uncertain event of X losing in the race and B will win on the uncertain event of X winning in the race.

According to Section 30 of the Indian Contract Act an agreement by way of wager is void, and no suit can be brought for recovering anything alleged to be won on any wager and entrusted to any person to abide the result of any game or other uncertain event on which any wager is made. Wagering contracts are not generally illegal and have been declared void only by the Indian

¹ (1893) 1 Q.B. 256

Contract Act. But the Indian Penal Code (S. 294 A) makes it a criminal offence by declaring that whoever keeps any office or place for the purpose of drawing any lottery not authorised by Government shall be punished with imprisonment of either description for a term which may extend to six months or with fine, or both. And whosoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear from doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or sign in any such lottery, shall be punished with fine which may extend to Rs. 1,000¹. Apart from this type of agreement there is no law in India which makes wagering as such illegal, stating that they are always void.

A contract of insurance on the other hand is not a wager because the party insured has an interest apart from the wager. Thus, in a contract of fire insurance, the insured's object is to be able to indemnify himself in case he suffers loss due to fire. In the same way, in a contract of life insurance the object of the insured is to secure a compensation for his dependants in the event of his death. A bonafide insurance contract is not a wager. But a insurance on the life of a person in which the insured has no interest whatever is void as being a wager.

Immoral agreement :

Any agreement for future illicit cohabitation or for furtherance of immoral purposes like prostitution is void. A and B agree to live together in illicit cohabitation and A binds himself to pay B £60 annually after his death. The agreement is void.¹ A, a bouncer or driver, agrees to take B, a prostitute, round the town for a certain sum of money so that the latter can attract customers. The contract between A and B is void as against public policy.²

Contracts in abuse of legal process :

A person is entitled to advance money to assist a poor litigant. But if the contract for advance of money was for the purpose of stirring up litigation and strife or sharing the profits of litigation or for any other unconscionable purpose the contract is void as contrary to public policy.

¹ Walker vs Perkins (1764) 1 W.Bal. 517

² Pearce vs. Brooks (1866) L.R. 1 Ex. 113

Contracts void for incapacity of parties

We have seen before that infants, lunatics and insolvents cannot enter into valid contracts.

Joint liability and joint and several liability :

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise. (S. 43). In this respect Indian law differs from English law in that according to English law joint contractors cannot be sued separately, but must be sued jointly.

If the promisee obtains damage against one of the joint promisors, the other joint promisors must contribute equally with the first joint promisor.

Where the promisee obtains damage for breach of contract against one of the joint-promisors and the damage is not realised from him, the promisee cannot sue the other joint promisors for the satisfaction of the damage.

"But a *joint promise* differs from a *joint and several promise*. In the case of a joint promise the obligation is single and is extinguished by a judgment recovered in suit against any one of the joint promisors ; and even if that judgment remains unsatisfied a fresh suit cannot be brought against the other co-promisors." But in the case of joint and several liability the liability is joint as well as separate. Therefore the obligation in this case is not extinguished by recovering judgment against one of the several joint-promisors. The creditor can sue more than one joint-promisor in case the judgment remains unsatisfied

Discharge or termination of contract :

A contract, as we have seen, involves a promisor and a promisee. The promisor and the promisee each enters into certain obligations. When these obligations come to an end, it is said that the contract has been discharged or terminated. Now, a contract may be discharged in any one the following ways :—

1. By performance or fulfilment.¹
2. By fresh agreement.²
3. By impossibility of performance.³

¹ Sections 37, 38, 51-55.

LAW OF CONTRACT

4. By "breach or renunciation of contract."
5. By operation of rules of law.

Discharge by performance :

Performance is the most common way of discharging contractual liability. A promises to deliver to B 10 tons of coal if B pays Rs. 30/- So far as A is concerned his contractual liability will be discharged when he delivers the ten tons of coal to B in which case he will be deemed to have performed his side of the contract. Now, a contract involves a double liability. In our above example the first liability is that of A to deliver ten tons of coal. The second liability is that of B to pay Rs. 30/- The delivery of coal by A will not naturally discharge B's liability to pay. B's liability will be discharged when he pays Rs. 30/. We must, therefore, distinguish between performance which discharges one of the two parties from his liabilities under a contract and performance which discharges the contract as a whole. When, for instance, A promises to repair B's watch in consideration of B having mended A's car a year ago, the whole contract will be discharged when A repairs B's watch. But where a promise is given in consideration of another, as in our first illustration, performance by one party does no more than discharge him who has performed his part.

In a contract where the special skill and personal qualifications of the promisor are the essential parts of the contract, performance must be by the promisor himself. In the case of contract not involving special personal qualifications, the promisor may rely on the act of his agents as performance by himself. Thus, if a painter contracts with me to paint my portrait, the painter must paint the portrait himself, for his personal skill and qualifications were what I bargained for. He cannot rely on another painter to do the job. But if I have a contract with a grocer to supply me with Rs. 5/- worth of sugar and tea every week, it matters not to me from whom the sugar and tea might come so long as they are of the same quality as I bargained for. The grocer may perform his side of the contract very well by relying on another.

¹ Section 59.

or any other agent of his for the supply of the things to the.¹

Where according to the contract the promisor is to perform his promise without the promisee asking him to do it, i.e., without application by the promisee, and no time for performance is specified, the contract must be performed within a reasonable time.² What is

Time and place for performance

a reasonable time depends in each case on all the facts and circumstances of the case. One day may be reasonable in the case of a contract for sale of shares, whereas a year may not be unreasonable in a contract for sale of land. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.³

When a promise is to be performed on a certain day and the promisor has not undertaken to perform it without application by the promisee it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.⁴

When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, the promisor should apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place.⁵

Time being the essence of contract :

When a party to a contract promises to do a thing at or before a specified time and fails to perform the contract at or before the specified time, the promisee can treat the contract as void, i.e., avoid the contract, only if it was the intention of the parties that time should be the essence of the contract.

If it was not the intention of the parties that time should be the essence of the contract, the contract does not become voidable by the failure of the promisor to perform the contract at or before the specified time.⁶

¹ Section 40

² Section 46.

³ Section 47.

⁴ Section 48.

⁵ Section 49.

⁶ Section 53.

The intention of the parties to make time the essence of the contract may be gathered from express words or from the nature of the transaction.

In mercantile transactions time is usually deemed to be the essence of contract unless otherwise provided. But in the case of sale of land, time is not regarded as the essence unless otherwise provided.

2. Discharge by fresh agreement :

The parties to a contract may, by a fresh agreement, discharge the old contract. This can be done in three ways, namely (a) Rescission, (b) Alteration and (c) Novation.

(a) *Rescission* :—Rescission simply means rescinding or cancelling the original contract by mutual agreement whereby the old contract ceases to be binding on any of the parties.

(b) *Alteration* :—Alteration means substituting a fresh contract with altered or different terms from the original one. A agrees to supply B 500 yards of blue serge for Rs. 6 a yard within 6 months. Later on A and B alter the agreement in the following way. A agrees to supply 400 yards instead of 500 and within eight months instead of six. The latter agreement puts an end to the former.

(c) *Novation* :—Novation takes place when one party to a contract releases the other and a stranger to the contract comes and accepts the liability of the party released. Thus, novation actually means a new agreement which substitutes the old one wherein (i) one of the parties to the original contract is relieved of all liabilities and (ii) a new party undertakes all the liabilities of the released party in consideration for the release. Miller's case¹ gives us an example of novation. The facts were as follows : A particular Insurance Company agreed to pay Miller's heirs an annuity of £200/- on his death in consideration of Miller paying a certain annual premium. Later on, the European Association took over the business of the Insurance Co. It was agreed that the European Association will be bound by all the contracts of the Insurance Co. Miller also agreed to this arrangement and started paying his premium to the European Association. It was a case of novation and the contract between Miller and the Insurance Co. was discharged.

¹ (1876) 3 Ch.D. 391.

Discharge by impossibility of performance :

It is a well known fact that an agreement to do the impossible is by itself void¹. If I agree with B to take him to the moon for a certain sum, the agreement will be void *ab initio*. But it happens very often that parties to a contract undertake to do certain things which are by no means impossible but which become impossible to perform later on due to causes beyond their control. This is called *supervening impossibility*. In such a case the contract is discharged and becomes void.

Supervening impossibility :

Supervening impossibility arises in the following ways :—

(a) Impossibility arising due to change of law :—One cannot agree to do a thing illegal at the time of the contract. But if one contracts to do a thing which is, at the time of the contract, lawful, but a new Act comes in and hinders him from doing it, the contract will be discharged. In *Kursell v. Timber Operators and Contractors*², there was an agreement for the supply of timber from Latvian forests. By a subsequent Latvian Law the cutting of timber by private companies was forbidden. The party which was bound by the contract to supply such timber was excused and the contract was held to be discharged by the coming in of the new Latvian law. Similarly, a contract to supply goods from a country against which war is subsequently declared will be discharged as it will be illegal to supply such goods.

(b) Impossibility due to the destruction of things or persons vital to the contract :—In a contract where performance depends on the continued existence of a given person or specific thing or of the existing state of affairs, the impossibility arising as a result of the destruction of such person or thing will discharge the contract and excuse performance. In *Howell vs. Coupland*³, the defendant contracted to deliver to the plaintiff part of a specific crop of potatoes in autumn. Before autumn the crop was destroyed by pest due to no fault of the defendant. It was held that the performance of the contract depended upon the existence of the crop. With the destruction of the crop, the contract was

also discharged. Similarly, in *Taylor v. Caldwell*¹ the defendant agreed to let a music hall to the plaintiff for a series of concerts. Subsequently the music hall was destroyed by fire. It was held that as the existence of the music hall was the foundation of the contract, the contract was discharged with the destruction of the hall.

(c) Impossibility due to non-occurrence of contemplated events or state of things :—Where the happening of a future event or the continued existence of a certain state of things are *contemplated* by the parties as the only *foundation* of the contract, the contract is discharged when the event does not happen or the state of things comes to an end. This is called discharge under a condition. A condition is something on which the whole contract rests. It may be either (i) a condition precedent or (ii) a condition subsequent or (iii) a concurrent condition.

(i) A condition precedent is a condition, *express* or *implied*, that the contract shall not bind one or both of the parties until and unless some event has happened.

A agrees to take the house of B provided the drains are in order. In this case A will not be bound to take the house unless the drains are in order.

(ii) A condition subsequent is a condition *express* or *implied* that upon the happening of some event after the contract has become binding, the contract will be discharged. A takes the lease of B's house for three years with the provision that the lease shall terminate whenever the drains will go out of repair. Here, if after one year the drains get out of repair, A can terminate the lease.

(iii) When in a contract the obligation of each party is dependent on the performance by the other, it is said that the obligation of each is a concurrent condition of the obligation of the other.

In all our previous examples conditions have been *expressly* mentioned. But the rule regarding them applies to cases where it can be inferred from the terms of the contract and the surrounding circumstances that the happening of a future event or the

¹ (1863) 3 B. & S. 826.

continuance of some state of things must have been contemplated by both the parties as the basis of the contract

In all such cases where from the terms of the contract and the surrounding circumstances it can be inferred that the happening of some future events or the continuance of some state of things must have been contemplated by both the parties as the basis of the contract, the law will imply that the contract is made subject to a condition subsequent and that it is to be dissolved if that event does not take place or if the state of things changes. This implied condition only excuses the performance if subsequently the whole contract becomes impossible of performance through some causes for which neither party is responsible. This cause must be such as to frustrate altogether the performance of the contract.

In *Krell v Henry*¹, the facts were—Henry agreed to hire a flat belonging to Krell on certain days on which the Coronation procession of King Edward VII was arranged to pass. Krell's flat was on the published route of the procession. Afterward the procession was abandoned on the days originally fixed due to the king's illness. It was held in this case that the abandonment of the Coronation procession owing to the illness of the king totally upset the performance of the contract as the contract was interpreted as one for the letting of the flat solely for the purpose of viewing the Coronation procession and as the taking place of the coronation procession was regarded by both the contracting parties as the sole foundation of the contract. This foundation having been destroyed the contract was discharged and Henry had no liability as regards the rent of the flat.

Rights of parties in case of discharge by supervening impossibility :

According to Section 56 of the Indian Contract Act a contract becomes discharged due to supervening impossibility. Where a contract becomes impossible due to this cause, it becomes void and the party who has received any advantage under it, is bound to restore it to the other party under Section 65 of the Indian Contract Act. In *Boggiano & Co v Arab Steamers Co Ltd*² the facts were as follows :

¹ (1903) 2 K.B., 740

² (1916) 40 Bom. 529

A pays freight to B for 2,500 bales of cotton¹ to be carried on a ship belonging to B from Bombay to Genoa. The freight is paid in advance, and the goods are put on board the ship. While the ship is lying in the harbour, export of cotton to Genoa is prohibited by orders of the Government and the voyage is abandoned. A is entitled under section 65 to recover from B the freight paid in advance. This right is not affected even if B is a common carrier. The Privy Council in one of its latest decisions in *Muralidhar Chatterjee vs. The International Film Co. Ltd.*², has extended the principle of restitution to cases where one party rescinds a contract for the default of the other. It has been laid down that in such cases the party rescinding the contract is entitled to damages if he has suffered any, but he is bound at the same time to restore any advantage he has received under the contract.

In England, however, the law was, until recently, different to that in India. There when a contract is dissolved by reason of supervening impossibility, the rule is that, though the parties are excused from further performance, yet the loss remains where it lies at the time when the contract is dissolved. The law was laid down in *Chandler vs. Webster*³, as follows:—(a) no action lies for money not due at the time of dissolution, (b) no action lies to recover back money rightly paid under the contract before its dissolution, (c) money due but unpaid at the time of dissolution is recoverable. Thus in *Civil Service Co-Op. Society Ltd. vs. General Steam Navigation Co.*⁴ the Plaintiff, by a charter-party, agreed to hire a steamer for a Naval Review on the occasion of the King's Coronation, and in accordance with the terms of the Charter-party, paid £. 250 in advance. The review having been abandoned the plaintiff could not recover the money paid.

It is obvious from the above that the rights and liabilities of the parties under a contract which is discharged due to supervening impossibility is different in India from those in England. But in the latest House of Lords decision in *Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour, Ltd.*⁴ the English Law

¹ 47 C.W.N. 497.

² (1904) 1 K.B. 493.

³ (1903) 2 K.B. 756.

⁴ (1942) 2 A.E.R. 122.

has been brought into line with the Indian Law and the old law in *Chandler vs. Webster* has been overruled.

4. Discharge by breach or renunciation :

Where one party to a contract breaks the contract or shows by his conduct or words unwillingness to carry out his part of the contract, the other party is entitled to treat the contract as discharged. He has two remedies, *viz*,—

- (i) to treat the contract as discharged and to sue the offending party for damage for breach of contract, or
- (ii) to treat the contract as still binding in case the time for the performance of it has not yet arrived and compel the other party to perform his part when the time for it comes

N.B. When one party to a contract shows by conduct or words his unwillingness to perform his part of the contract or is incapacitated in such a way as not to be able to perform, the other party can treat such a conduct as *an anticipatory breach of contract*.

It is called an anticipatory breach because the contract is not broken but is in all likelihood going to be broken. In such a case, the other party need not wait for the time of the performance of the contract. He can repudiate the contract and treat it as discharged as soon as there is an anticipatory breach

5. Discharge by operation of law :

In certain cases contracts are discharged by the operation of certain laws even though such contracts be valid in every respect. Thus, under the Limitation Act certain contracts become discharged after the lapse of a prescribed period of time and parties to such contracts cannot sue on them after the expiry of the prescribed period of time. Similarly, when an insolvent is discharged by the Insolvency Court, all his contracts are discharged by the operation of the Law of Insolvency

Breach of contract :

Breaches of contract are of two kinds, either of which gives a cause of action to the party injured by the breach :—

- (1) Actual Breach—This happens when a party does not perform his promise in the manner and at the time stipulated by the contract. B contracts to sell his land to A before 1st

July, 1941. B fails to convey the land before 1st July, 1941. B has broken the contract.

(2) Anticipatory breach or Breach by renunciation—This happens when before the time for performance a party shows by his conduct or words his unequivocal intention of not performing the contract or makes himself incapable of performing the contract. A contracts to build a house for B for a certain sum within two years. Even after a year and a half has passed A has not started any work on the house. Moreover, he has told B's agent several times that he would not start any work on the house unless B agrees to pay him a greater sum than that stipulated in the contract. B need not wait till two years have elapsed and then sue B for breach of contract. He may at once sue B for breach of contract for the intention of B not to proceed with the contract was manifest and it amounted to renunciation or anticipatory breach of contract.

Remedies for Breach of Contract :

In case of a breach of contract, the party ~~injured~~ has the following remedies—

- (i) He can treat the contract as discharged and not binding on him and claim damages for the breach of contract.
- (ii) He can claim a quantum meruit, i.e. a reasonable sum as reward for anything that he may have done under the contract.
- (iii) He can claim damages in an action upon the contract.

(i) Discharge :

We have discussed before how breach of contract by one party relieves the other party from all contractual liabilities. The injured party can further sue for damages for breach of contract.

(ii) Quantum Meruit :

Quantum meruit literally means paying a person as much as he has earned. Where a person supplies another person with goods or works at the latter's request without any remuneration being fixed from beforehand, the law always implies a reasonable

remuneration for the goods supplied or work done. This reasonable remuneration is known as *quantum meruit*. From the point of view of breach of contract, however, an action for *quantum meruit* arises in a different way. A contracts with B to build the latter's house for Rs 30,000/. After A has proceeded with the work for sometime and before the building is completed, B repudiates the contract and prevents A from proceeding with the work. In this case A can claim a *quantum meruit* for the work he has already done. He can further sue B for damages for breach of contract.

(iii) Damage :

Where a party to a contract breaks the contract, the injured party can sue the other party for such damages as will be fair compensation for the loss he has actually sustained because of the breach. But he cannot expect to be compensated for all the losses he can trace to the breach of the contract. He is entitled to compensation for only such losses or damages as (i) arise naturally from the breach of contract, or (ii) were or might reasonably be supposed to have been in the contemplation of the parties at the time of entering into the contract. These two criteria for a proper estimate of loss suffered through breach of contract were laid down in the English case of *Hadley vs Baxendale*¹. The facts of the case were as follows. The owners of a flour mill sent a broken iron shaft to the office of the defendants who were common carriers to be conveyed by them to the consignee to whom it had been sent by the plaintiff mill owners as a pattern by which to make a new shaft. Due to the negligence of the carriers, i.e. the defendants, the delivery of the shaft was delayed and the plaintiff could not get a new shaft for many days, as a result of which the plaintiff's mill was closed. Upon this the plaintiff sued the defendants for the loss of profits which would have been earned had not the mill been closed. It was held that the carriers never contemplated at the time of the contract that the mill would be closed if the new shaft did not come quickly. The mill might easily have had a spare shaft under the same conditions. Of course, if the owners of the mill had informed the carriers at the time that the mill would be closed in case of delay in the delivery of the shaft, the case would have been different.

¹ (1854), 9 Ex 374.

Rule in *Hadley vs. Baxendale* :

Now let us consider each of the two criteria laid down in the case of *Hadley vs. Baxendale*.

(1) Loss arising naturally out of the breach of contract : Any number of consequences may flow out of a breach of contract—some distant and some proximate. A employs B as his servant for a period of two years. Before the expiry of two years A dismisses B. The immediate consequence of the breach of contract is the loss to B of the wages. The remote consequences may be any number. B might, while looking for another job, catch influenza and incur expenditure on doctors and medicine, or be run over by a taxi and lose his leg. B certainly cannot recover the loss due to these remote consequences. Such loss does not arise naturally out of the breach of contract.

(2) Loss which might reasonably be supposed to be in the contemplation of the parties at the time of the contract : Losses which might be remote may still be recovered by a plaintiff in an action for breach of contract provided such losses were contemplated by the parties at the time of the contract. We have seen before that the plaintiff in *Hadley vs. Baxendale* could have recovered the loss of profits which might have been earned if they had informed the defendants at the time of the contract that the mill would be closed in case the delivery of the shaft was delayed.

A party who suffers loss from a breach of contract is bound to do all that a reasonable and prudent man would do to mitigate the loss. He must not sit inactive. If he does not try to mitigate the loss he will not be entitled to that amount of loss which he might have prevented by timely vigilance. A agrees to buy cotton from B for the purpose of running his textile mill. B fails to supply the cotton. A should buy cotton elsewhere and sue B for the difference in price. He must not increase his loss by letting his mill close down and incurring other liabilities if he can get similar cotton elsewhere.

Damage for breach of contract is nothing but a compensation for the loss suffered by the injured party. No exemplary damages are allowed even though the motive for the breach of contract was foul. Damages cannot also be awarded to the injured party for injured feelings, mental worry and so on caused by the breach.

Penalty and Liquidated Damages :

In many contracts the parties stipulate at the time of making the contract that a specified sum shall be payable for breach of it. The sum so fixed may be either—

- (i) Liquidated damages, i.e., a sum payable as damages the amount of which is determined by the parties beforehand, instead of being left to court, by a fair and honest estimate of probable losses likely to be caused by the breach,

Or

- (ii) A penalty, i.e., a sum which has no relation to probable losses which may arise and which has been stipulated by the parties *as in terrorem*, i.e., for the purpose of penalising a party who might break the contract.

If in the case of a breach of contract the court finds that a sum stipulated as damages in the contract is in the nature of liquidated damages, the court awards such a sum as damages without either increasing or reducing it. If, however, the court finds that the stipulated sum is in the nature of a penalty, the court *can* award such sum as damages not exceeding the sum stipulated as the court thinks fit¹

Whether a stipulated sum is in the nature of liquidated damages or penalty is in every case determined by the court with reference to all the facts and circumstances of each case. A sum specifically mentioned as damages may still be found to be a penalty by the court if it thinks that the damages mentioned are excessive and unconscionable or bear no true relation to the loss which may result from a breach. A contracts with B to pay Rs 1000 if he fails to pay B Rs 500/- on a given day. A fails to pay Rs 500 on that day. B is entitled to recover from A such compensation not exceeding Rs. 1000/- as the court considers reasonable. The reason is that the sum of Rs 1000/- bears no relation to the loss which B might suffer for the failure of A to pay Rs 500/- on the given day. Rs 1000/- is surely excessive and unconscionable.

Other Remedies for Breach of Contract :

Apart from the remedies mentioned above there are two more remedies open to a party injured by a breach of contract, namely—

(1) *Specific Performance* : In certain cases where damages do not give adequate relief to a party who suffers from a breach of contract. There the party breaking the contract is compelled by the court to perform his part of the contract by a decree of *specific performance*. B has a piece of antique. B contracts to sell the antique which A's father gave him. Afterwards he refuses to sell. Here the award of damages will not give A adequate relief. He does not want the money but the article. In such a case the court will issue a decree for specific performance to compel B to complete the sale. It is obvious that specific performance is granted only in rare cases.

(2) *Injunction* : An injunction is an order of the court restraining a party to a contract from breaking the contract. This is also granted in rare cases where damages fail to give adequate remedy. A theatre company engages an actor for three months. After the first month the actor signs a contract with some other theatre company. Here the proper remedy would be to restrain the actor from acting in the second theatre. In such a case the court will grant an injunction.

Quasi Contracts or certain relations resembling those created by a Contract :

There are certain transactions which give rise to obligations similar to those created by a contract though they are not contracts proper. These transactions are known as *quasi-contracts* and may be enumerated as follows :—

(1) If a person, incapable of contracting by law, e.g., an infant or a lunatic, or any one whom he is legally bound to support, i.e. his wife or children, is supplied by another person with necessities suited to his condition in life, the person supplying such necessities is entitled to be reimbursed from the property of such person who is incapable of contracting.¹

(2) A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. A holds his land as a tenant from his zemindar B. B fails to pay the government revenue for which A's tenancy is going to be annulled by revenue

¹ Section 68.

A pays the revenue for B. He can claim the money back from B¹.

(3) Where a person does anything for another person or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered. We have discussed this in connection with *quantum meruit*.²

(4) A person who finds goods belonging to another and takes them into his custody must restore them to the owner³.

(5) A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it⁴.

Appropriation of payment :

A debtor may be indebted to the creditor in respect of several sums, e.g., A borrows two sums of money, say Rs. 200 and Rs. 400/- at different times. A in this case is indebted to B in respect of two sums. In such a case when the debtor pays money to the creditor he may either (i) specifically appropriate or apply to the payment to a particular debt or demand, or (ii) pay it generally in respect of his indebtedness⁵.

If the debtor wants to apply or appropriate the payment to a particular debt, he must intimate the creditor expressly or impliedly by conduct of his intention to do so at the time of the payment. The debtor cannot appropriate after he has made the payment already. The creditor is bound by the debtor's appropriation and cannot treat the payment as being made in respect of some other debt or towards indebtedness in general.

Where, however, the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law of limitation⁶.

¹ Section 69.

² Section 70.

³ Section 71.

⁴ Section 72.

⁵ Section 59.

⁶ Section 60.

In *Mills v. Bowkes*¹ the facts were as follows. A was indebted to B for £100/- which was barred by the Statute of Limitation, and £150/- which was not barred. A paid £250 without appropriating it to any particular debt. B sued A for £250/ on the two debts. A pleaded as to the debt of £100/- that it was barred and as to the debt of £150/- a deduction of £15/ on account of the payment. It was held that as A did not appropriate the payment to the debt of £150/- B could appropriate it generally on account and thus towards the barred debt of £100/. Thus B was held to be entitled to recover the £150/-

Indemnity, Guarantee and Suretyship :

A contract by which one party promises to cover or save the other from loss caused by the promisor or by a third person is called a contract of indemnity. A's ship is going on a long voyage. In consideration of a certain premium Indemnity and Lloyds Insurance Co undertakes to make good Guarantee any loss which may be caused to A in case the ship or the cargo are lost on the sea. This is a pure case of a contract of indemnity.

A contract of guarantee on the other hand is a contract to perform the promise or discharge the liability of a third person in case of his default.² A says to B, "Lend C Rs 200/- and I shall pay you if C fails to repay." This is an example of a contract of guarantee. Here A's liability to pay arises because he guarantees the payment of Rs 200/- in case of C's default. But A's liability is, nevertheless, *secondary*. The primary liability is of C to pay, and A's liability will arise only when C fails to pay back. The person who gives the guarantee is called the surety, the person in respect of whose default the guarantee is given is called the *principal debtor*, and the person to whom the guarantee is given is called the *creditor*. In the above case A is the surety, C is the principal debtor and B is the creditor.

There are two main differences between a contract of indemnity and a contract of guarantee—

¹ (1899), 5 Bing. N S 455

² Section 124.

³ Section 125.

(1) In a contract of indemnity the promisor undertakes a primary and not a secondary liability. Thus, the difference between Lloyd's Co., in the above example, has the primary liability of covering the loss of A. But in a contract of guarantee the surety undertakes only a secondary liability.

(2) In a contract of indemnity there are only two parties, namely, the promisor and the party to be indemnified against loss. But in a contract of guarantee there must always be three parties, namely, the surety, who undertakes to discharge the liability of the principal debtor in case he defaults, the creditor, and the principal debtor.

The difference between the two types of contract is very well illustrated by Guild vs. Conrad¹. There the defendant requested the plaintiff to accept the bills of exchange of a firm of Demerara merchants and promised that he would, if necessary, meet the bills at maturity, i.e. if the firm of Demerara merchants failed to meet the bills, the defendant would meet them. Obviously, the liability of the defendant was secondary and as such the contract was a contract of guarantee. Subsequently, the firm of Demerara merchants fell into difficulties and the defendant asked the plaintiff to accept the bills of exchange drawn by the said firm and promised that he would supply funds in any event to meet the bills at maturity. In the latter contract the defendant apparently undertook the primary liability and the contract was, therefore, a contract of indemnity.

A guarantee which extends to a series of transactions which is to be performed by the principal debtor is called a continuing guarantee². A guarantees payment to B, a tea-dealer, to the amount £100/- for any tea he may from time to time supply to C. Here the guarantee relates to a series of supplies coming from B to C. B supplies C with tea to the value of £100/- and C pays B for it. Afterwards B supplies C with tea to the value of £200/-. C fails to pay. The guarantee given by A was a continuing guarantee and he is accordingly liable to B to the extent of £100/-.

¹ (1894) 2 Q. B. 884; 26 Digest, 11, 12.

² Section 129.

A continuing guarantee may be terminated in the following two ways :-

(1) **Revocation** A continuing guarantee may be ~~revoked~~ at any time by the surety. After such revocation the surety is no longer liable for future transactions, but he still remains liable for all transactions completed before his notice of revocation reached the creditor. A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of Rs. 5000. A revokes the guarantee after three months. But before the revocation B has discounted bills for C to the extent of Rs. 2000. The revocation discharges A from all future liability to B for any subsequent discount. But A is liable to B for the 2000 rupees on default of C.

(2) **Death of Surety** The death of a surety puts to an end continuing guarantee as regards all future transactions unless there is any contract to the contrary.

The promisee in a contract of indemnity, i.e. the indemnity holder, has the following rights --

(1) He can recover from the promisor all the loss which the Rights of an promisor promised to indemnify indemnity holder (Sec. 125)

(2) He can recover all damages which he may be compelled to pay in any suit relating to the subject matter of the indemnity. New India Insurance Company insures A's car against all loss and accident. This is a contract of indemnity. A, driving his car negligently knocks against B's car and injures it. B sues A and the court awards damages against A. The New India Insurance Co. is liable to make good the damages to A.

(3) He can recover all costs necessary for bringing or defending such suits as mentioned in (2) above, provided he acted according to the orders of the promisor, or behaved as an ordinary prudent man would do under the circumstances, and did not act contrary to the promisor's instructions.

(4) He can also recover any money paid under a compromise in a suit as mentioned above.

The liability of the surety is co-extensive with that of the

Principal debtor unless the contract provides otherwise. Until the debt or the liability of the **principal debtor** is discharged, the surety remains liable. Even the death of the principal debtor does not discharge the surety's liability. In case the principal debtor defaults, the creditor can proceed against the surety unless the contract provides that the creditor must proceed against the principal debtor first.

Liability of a surety (Sec. 128)

The following are the rights of the surety :

(1) The surety is entitled to proceed against the principal debtor in the same way as the creditor when the surety pays or performs all that he is liable for upon default of the principal debtor. He is invested in this respect with all the rights of the creditor.

Rights of surety. (Sec. 140).

(2) If the principal debtor gives any security to the creditor at the time of the contract, the surety is entitled to the benefit of every such security. If the creditor loses or parts with the securities without the consent of the surety, the liability of the surety is reduced to the extent of the value of the securities (Sec 141).

The liability of the surety for the default of the principal debtor is terminated or discharged in any one of the following cases.

Discharge of surety.

(1) By variation of the original contract. When the principal debtor and the creditor vary in any way the terms of their original contract by a subsequent agreement, the old contract is discharged, and along with it the liability of the surety, as to transactions subsequent to such variation, is also discharged, provided the variance was made by the creditor and the principal debtor without the consent of the surety. C agrees to appoint B as his clerk to sell goods at a yearly salary upon A's becoming surety to C for B's duly accounting for money received by him as such clerk. Afterwards C and B vary the terms of the employment contract without A's consent by stipulating that B should be paid a commission on the goods sold by him, instead of a yearly salary. If after this variation B fails to account for the goods he sold, A will not be liable to C, as C and B have made a variance in the terms of the original contract without A's consent (Sec. 133).

(2) By the discharge or release of the principal debtor: If the liability of the principal debtor is discharged, the liability of the surety is also discharged. The liability of the principal debtor is discharged when either the creditor releases him by a fresh contract, or the creditor does something which amounts to a breach of contract and thus effects a discharge of the principal debtor. A gives a guarantee for B to C for the payment for goods to be supplied by C to B. C supplies goods to B and afterwards B gets into financial difficulties and contracts with C to transfer to him B's property in consideration of C releasing B from his liability to pay for the goods. Here B is released from his debt on account of the goods supplied by C, and A is also discharged from his liability as the surety. Now, let us illustrate how a breach of contract by the creditor discharges the principal debtor and along with him the surety. A contracts with B to grow crops of indigo on A's land and to deliver it to B at a fixed rate and C guarantees A's performance of the contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents A from performing the contract. Here B's act amounts to an anticipatory breach of contract as he makes the performance of the contract by A impossible. A will, therefore, be discharged from all liability, and with him C will also be relieved of all liabilities as the surety¹.

(3) By the creditor compounding, giving time, or agreeing not to sue the principal debtor: If the creditor comes to terms, or settles with the principal debtor, or if the creditor extends the time during which the principal debtor must pay or perform his contract, or if the creditor agrees with the principal debtor not to sue him, the surety is discharged and all his liability as the surety is terminated². But the surety is not discharged when the contract to give time to the principal debtor is made by the creditor with a third person and not with the principal debtor³.

(4) By the creditor's act or omission impairing surety's eventual remedy: If the creditor does an act which interferes with the rights of the surety, or if the creditor does not do something which it is his duty to do, with the result that the

¹ S. 134.

² Section 135.

³ Section 136.

surety is put to difficulty in enforcing his rights against the principal debtor, the surety is discharged. A puts M as apprentice to B and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised and M embezzles the cash. A is not liable to B on his guarantee as B did not do what was his duty under the contract, namely, seeing M make up the cash at least once a month¹.

Agency :

In the course of our study of the Law of Contract we have dealt with two parties entering into a contract

Definition of 'Agent' and 'Principal.' In the vast business world of to-day it is not always possible for parties to come into direct contact for the purpose of entering into contracts

I may have a cotton mill in the suburbs of Calcutta. To buy raw cotton I have to enter into contracts with cotton dealers in Bombay. To sell manufactured cloth I have to deal with retail merchants coming from all over Bengal. Is it possible for me to deal with these numerous people myself? Certainly not. Like all other businessmen I have to delegate my power to contract to people who will contract on my behalf. I may have my son in Bombay who contracts with cotton dealers there on my behalf. I may have another man at Dacca to contract with the local cloth-dealers there on my behalf and so on. All such people whom I may appoint to contract on my behalf are in the language of law my 'Agents' and I am the 'Principal' in relation to them. Sec. 182 of the Contract Act defines an *agent* as one employed to do any act for another or to represent another in dealings with third persons. The person for whom the agent acts or whom he represents is called the *principal*. The law of agency as laid down in the Indian Contract Act regulates the relationship between an 'agent' and his 'principal.' The foundation of the law of agency is the principle that what a person does by another he does himself—*Qui facit per alium facit per se*. A person can do by an agent all that a person wants to do or is compelled to do excepting those that can be performed only personally, as when a painter undertakes to paint a portrait himself.

Capacity to appoint or act as an Agent :

Any person may act as an agent. But an infant or a person of unsound mind cannot be appointed to act as an agent to a principal so as to be personally liable to the principal¹. Any person who has capacity to contract can contract by an agent. But a person who is incapable of contracting by law cannot contract by an agent. Thus, contracts made by an adult or sober agent on behalf of an infant or a lunatic will not bind the infant or the lunatic unless they are contracts which would bind the estate of the infant or the lunatic if they were made by himself on his own behalf. Similarly, a person who has a limited capacity to contract cannot make a contract by an agent which he cannot make personally. A company, for instance, can enter into only such contracts as are within the powers granted by its memorandum². If a Company makes a contract falling outside these powers by one of its agents, such a contract will not bind the Company. The essence of agency proper is that the agent has no rights and duties under the contract. It is merely a medium through whom the principal is connected contractually with third persons. The agent's rights and duties are only in relation to his principal. Under the contract which he makes on behalf of his principal, he has neither any right nor duty. But a person who has no capacity, or only a limited capacity, to contract e.g., a minor or a lunatic is competent to contract so as to bind his principal to third parties. The reason is that the act of an agent is regarded as the act of the principal as between the principal and third parties. Thus a contract in writing entered into by an agent who did not understand the true purport of the contract would nevertheless bind the principal³.

Creation of Agency :

As we have seen before, no consideration is necessary to create an agency⁴. An agent without any remuneration is entitled to act on behalf of his principal as much as any other agent with remuneration and he has the same rights and duties as the latter. An agency can be created in any one of the following ways —

¹ Section 184

² See post, Part II.

³ *Foreman v. Great Western Ry. Co.* (1878) 38 L.T. 851 65,188.

⁴ Section 185.

(1) By express or implied authority¹.

(2) By the principal giving his subsequent authority by ratification².

(3) By the principal being estopped from denying the authority of the agent³.

Let us now proceed to explain the above three ways —

(1) An agent can be appointed by express or implied authority. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case, things spoken or written and the usage or ordinary course of dealing are such circumstances from which authority is to be inferred. A has a studio where various customers come to have their photographs taken. A does not manage the studio himself. It is managed by B, who takes orders from customers, purchases chemicals and photographic goods from others and pays for them out of A's funds with A's knowledge. B has an implied authority under such circumstances to enter into contracts on behalf of A in respect of the business of the studio.

Extent of Agent's Authority :

An agent may be appointed to do one specific act or enter into one particular contract, in which case he is known as a *special agent*, or he may be entrusted with all acts of some general kind e.g., acts connected with a business, in which case he is known as a *general agent*. But whether the agent is a special or a general agent, he is deemed in law to have authority to do every *lawful* thing which is necessary in order to do such particular acts or all acts of some general kind as he may be entrusted with. An agent having authority to carry on a business has authority to do everything which is either *necessary* or *usual* for the purpose of conducting such business. Obviously an agent conducting a business behalf of his principal is given greater authority by law as he can do not only things which are necessary but also those which are usual. Now, let us illustrate the above by the case of a special and a general agent.

¹ Sections 186, 187

² Section 196

³ Section 237.

⁴ S. 188.

(a) A is employed by B residing in London to do a specific act, namely, to recover a debt due to B at Bombay. A may adopt any legal process, as a *special agent*, which is necessary to do the special act, namely, the recovery of the debt and may give a valid discharge for the same. But he cannot do anything which is usual but not necessary.

(b) A constitutes B his agent to carry on his business of Shipbuilder. B may do both *usual* and *necessary* things like the purchase of timber and other materials, hiring of workmen and so on for the purpose of the business.

An agent has far wider authority in cases of emergency than in normal circumstances. In an emergency an agent can do all that a man of ordinary prudence would do in order to protect his principal from loss. A consigns provisions to B in an emergency at Calcutta with directions to send them (S 189) immediately to C at Cuttack. B may sell the provisions at Calcutta if it is found that the goods will be spoilt in course of their journey to Cuttack.

(2) We have seen above that an agent must have express or implied authority to contract on behalf of his principal. Otherwise the principal is not bound by the contracts he makes. But where the agent contracts on behalf of his principal without his precedent authority, the principal may ratify such a contract. In case of such ratification, the principal is bound by the contract as if the agent had previous authority. Ratification may be done either by words spoken or written or by implied conduct. The following example will illustrate ratification by implied conduct. A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. If the principal can show that he did not possess full knowledge of all the facts when he ratified, he will not be bound by the ratification¹.

No person can ratify the acts of another which were done on his behalf, but without his authority, and the effect of which is to deprive some third person of his property rights or to subject

¹ Section 198

such third person to damages¹. A holds a lease from B terminable on three months' notice. C, an unauthorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

(3) The principle of estoppel is laid down in s. 115 of the Indian Evidence Act².

Applied to agency it is that a person who holds out some other person as his agent, though in fact he is not his agent, is bound by contracts entered into by the latter with third

Agency by Estoppel. S. 237 persons. The principle behind this rule is that a person, who holds out another before the general public either by his words or conduct, as the person or agent entrusted to do a particular act or general business on his behalf will be estopped from denying liability arising out of contracts entered into by such an agent. Thus, in *Soanes vs. L. S. W. R.* the plaintiff entrusted his luggage with a porter wearing the uniform of the defendant Railway Co. The luggage was stolen. The Railway Co. wanted to avoid liability for the loss on the ground that the porter was off duty. But it was held that the porter was held out by the Company as an agent authorised to receive luggages, and as such the Company was bound by his acts.

Agency by estoppel arises in three ways :—

- (1) A person may hold out another as his agent although that other is not or has never been his agent.
- (2) A person may hold out his agent as having a wider authority than he was given authority for. In *Watteau vs. Fenwick*³ the manager of a public house had only the authority to buy mineral water and bottled beers. But the manager bought some cigars though he had no authority to do so. The owners of the public house were held liable for the cigars as they, by their conduct, held out the manager to conduct everything connected with the public house.
- (3) A person may hold out another as his agent although that other has ceased to be so. In *Bruman vs. Loder*⁴

¹ Section 200.

² See *infra*, Part I.

³ (1919), 88 L.T. K.B. 524.

⁴ (1892) 1 Q.B. 346.

⁵ (1880) 11 A. & E. 589.

Loder's agent H used to sell tallow in the firm "Sold for L." After some time H ceased to be L's agent. But L did not notify that to his customers. So when H contracted to sell tallow to the plaintiff, Loder was held liable for the contract

Agent's duty to Principal¹:

An agent has the following duties towards his principal :

(a) An agent is bound to conduct the business of his principal according to the directions given by his principal. If there are no directions given by the principal, he must follow the custom or usage prevailing in the trade. If he acts contrary to such directions or custom he must make good any loss sustained thereby, and if there is any profit he must also account for it. The following illustrations will make the principle clear- -

- (i) A, an agent, carries on a business on behalf of his principal B. There is a custom in the business to invest at interest all moneys left in hand. A does not invest such moneys. A must make good to B the interest which B usually derives from such investments.
- (ii) B, a broker, carries on business on behalf of A. It is not the custom of the trade to sell on credit. B sells A's goods to C on credit. C becomes insolvent and fails to pay. B will be liable to make good the loss to A even if C's credit was very high at the time, as he acted contrary to the custom. It would have been the same if instead of being a custom it was A's direction not to sell on credit.

(b) An agent must discharge his duties with ordinary skill and reasonable diligence. By ordinary skill is meant skill possessed by persons in similar position, and by reasonable diligence is meant not perfect or utmost diligence, but such diligence as can be expected from men of ordinary prudence. Of course in every case the court decides whether ordinary skill or reasonable diligence has been exercised or not from all the circumstances of the case. If the principal suffers loss through want of

¹ Sections 211, 221.

the agent's ordinary skill or reasonable diligence, the agent must make good the loss. But the agent is not, however, liable for all the losses which might be traced to his want of skill or diligence. Here, as in the case of damages for breach of contract, the rule in *Hadley vs. Baxendale* is followed. The agent is liable only for losses which arise directly out of his want of ordinary skill or reasonable diligence and he is not liable for remote losses. The following illustration will make it clear.

A has an agent B in London. A sum of money is paid to B on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest at the usual rate from the day on which it ought to have been paid and for any further loss due to factors like a variation in the rate of exchange, but not for any other remote consequences.

If, however, a principal appoints an agent with full knowledge of his want of skill and diligence, the principal cannot recover any loss which might be caused by the agent's neglect.

(c) An agent is bound to render proper accounts to his Principal on demand.

(d) An agent must use all reasonable diligence to obtain instructions from his principal in cases of difficulty. If he can obtain such instructions but fails to do so and thereby brings loss to his principal, he must make good such loss.

(e) If an agent deals in the business of the agency on his own account either by dishonestly concealing material facts from his principal or by carrying on transactions to the disadvantage of his principal, the principal can repudiate the transactions. A directs B his agent to sell his house. B buys the house himself in C's name. A can repudiate the sale if he can show that B has dishonestly concealed any material fact or that the sale has been disadvantageous to him.

(f) If an agent deals in the business of the agency on his own account instead of on account of his principal, without the knowledge of his principal, the principal is entitled to claim any benefit which the agent has gained. A directs B his agent to buy a certain house for him. B buys the house himself and tells A that the house cannot be bought. A may, on discovering that B has bought the house, compel him to sell to A at the price he gave for it.

Principal's duty to agent.¹

A principal has the following duties towards his agent. —

(a) A principal is bound to compensate or indemnify his agent against the consequences of all *lawful* acts done by such agent in the exercise of the authority conferred upon him. B at Singapore, under instructions from A at Calcutta, contracts with C to deliver certain goods to him. A does not send the goods and C sues B for breach of contract. A asks B to defend the suit. B is ordered to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) A principal is bound to indemnify the agent against the consequences of any act which the agent does in good faith at the instance of the principal, though the act causes injury to the rights of third persons. B at the request of A sells goods in the possession of A and hands over the proceeds to A. A had no right to dispose of the goods. But B did not know that C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

(c) A principal is not bound to indemnify his agent for the consequences of any criminal act which the agent does at the request of the principal. The reason is that no one can protect himself from criminal liability by pleading that he was merely an agent. A employs B to beat C and agrees to indemnify him against all consequences of the act. B thereupon beats C and has to pay damages to C. A is not liable to indemnify B for those damages.

(d) A principal must make compensation to his agent for any injury caused to him through the principal's neglect. A employs B as a brick-layer in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up and B is in consequence hurt. A must make compensation to B.

(e) A principal must pay the remuneration, commission or other dues to the agent. In the absence of any contract to the contrary, an agent cannot claim any payment until the completion of the act for which he was constituted an agent. But an agent may retain money received by him on account of goods sold al-

¹ Sections 222-225.

though the whole of the goods consigned to him for sale may not have been sold. In the absence of any contract to the contrary, an agent is also entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Effect of agency on contract with third persons.¹

When a person contracts by his agent or acts through his agent his rights and liabilities are just what they would have been had he contracted or acted himself. A buys goods from B knowing that B is an agent for their sale but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and similarly A can sue the principal, when he discovers him, for any breach of contract.

Liability of principal when agent exceeds authority.²

We have seen before that an agent must have authority, implied or express, to act on behalf of his principal, unless, of course the principal ratifies the act of the agent subsequently. Where the agent exceeds the authority given by the principal, the principal is not bound by contracts lying outside the powers granted to the agent. A authorises B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6000 rupees. A may repudiate the whole transaction, for B has exceeded his authority by buying 200 lambs. But in some cases where an agent exceeds his authority, some acts he does fall within such authority and some acts fall outside it. When the part of what he does which is within his authority can be separated from the part which is beyond his authority, the principal will be bound by such acts as fall within his authority. In the above illustration let us suppose that A buys 500 sheep and 200 lambs in separate lots and pays for them in two separate lumps of Rs. 400/- and Rs. 2000/- instead of in one lump of Rs. 6000/-. Here obviously the purchase of 500 sheep falls within the authority of B and it can be separated from the purchase of 200 lambs which falls outside such authority. A will, therefore be bound by the purchase of 500 sheep by B.

¹ Sections 226, 238.

² Sections 227, 228.

Notice given to an agent.

Notice of any fact given to an agent is deemed to be notice given to the principal provided such agent has got authority to receive such notice, or in the usual course of business or by custom such agent receives such notice. An agent receiving such notice must also receive it in course of his duty as an agent in order that the notice may operate as a notice to his principal. A draws a hundi on his Bombay office in favour of the firm of B & Co. B & Co. informs the cashier of A's office in Bombay that the hundi has been stolen. The cashier does not inform the office and when he is away on leave the stolen hundi is presented and cashed. A is bound to pay to B & Co. over again, as the notice of the theft communicated to his cashier is notice to himself, since the cashier is deemed capable of receiving such notice. But if in the above case the durwan of A's office was told of the theft, A would not have been bound by the notice, for the durwan is neither authorised nor is it usual in the normal course of business for him to receive such notice. Also if the cashier knew of the theft from some one not connected with B & Co. or in course of his private dealings unconnected with his duty as a cashier, A would not have been bound by such notice.

Agent's right and liability under the contract he makes.¹

In the absence of any contract to the contrary an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. A has an agent B, B contracts with C for the sale of A's house. If C refuses to buy the house later on, it is A who can sue C for breach of contract. Similarly, if A refuses to sell the house it is A whom C must sue. But any contract can, of course, make provision for the personal liability of the agent and in such a case the agent can enforce the contract himself and will himself be liable under the contract. In the following cases of contract the personal liability of the agent is presumed¹

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad. A is the agent in Calcutta of B who is a merchant in London. A can enforce all

¹ Section 230

contracts he makes in Calcutta on behalf of B, and will be liable under them to persons with whom he contracts.

(2) Where the principal, though disclosed, cannot be sued. Foreign ambassadors, or heads of states, or sovereigns cannot be sued. Their agents entering into contracts with others are therefore personally liable on contracts they make.

(3) Where the agent acts as an agent but does not disclose the name of his principal. A enters into a contract with B knowing that he is an agent but ignorant of the name of the principal. B is liable to A personally under the contract and he can also enforce the contract against A. B would have been equally liable if A did not know or had no reason to suspect that he was an agent at all.

Undisclosed Principal :

(4) If an agent makes a contract with a person who neither knows nor has reasons to suspect that he is an agent, the principal of the agent is known as an undisclosed principal. He can disclose himself and ask for the performance of the contract. The other contracting party will also have against the principal all the rights he would have had against the agent, if the agent had contracted for himself. B contracts to buy some cotton from C, a cotton dealer. B is really contracting for A, his principal, but C does not know, nor has he any reason to suspect that B is A's agent. In this case B can obviously sue C if he refuses to sell the cotton, and C can also sue B if he refuses to buy the cotton. A can also sue C or be sued by C. As a principal he can always require the performance of the contract by the other party, and the other party can similarly make him liable under the contract.

If a principal is totally undisclosed like A in the above case the other contracting party C in the above case can refuse to fulfil the contract after the principal has disclosed himself, provided he can show that he would not have entered into the contract if he had known who was the principal, or if he had known that the agent was not the principal.

We have just seen that an undisclosed principal can always require the performance of a contract entered into by his agent with another person who neither knew nor had any reason to

suspect that the agent was an agent. But the principal is not bound to obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract. A, who owes 500 rupees to B, sells 1000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable grounds of suspicion that such is the case. C cannot compel B to take the rice without allowing him to deduct from the price A's debt of Rs. 500/-.

Right of person dealing with agent personally liable.

In cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable¹

Liability of a pretended agent :

If a person falsely represents himself to be the agent of another and thereby induces a third person to enter into a contract with him as agent, such a pretended agent is liable to make good any loss which such other person incurs as a result of entering into the contract. The pretended agent will, however, be exonerated from the liability if his alleged principal ratifies the contract subsequently².

Effect of fraud or misrepresentation by Agent :

If an agent makes a misrepresentation or commits a fraud, agreements entered into by others on the basis of such fraud or misrepresentation will be voidable at the option of the injured party, as if the principal had made the misrepresentation or committed the fraud. But if the agent makes misrepresentation or commits fraud in matters not falling within his authority the principal cannot be made liable thereby³.

Termination of Agency :

An agency is terminated, i.e. an agent ceases to be an agent, in the following ways⁴ :—

- (1) Revocation, express or implied, by the Principal, or renunciation by the Agent.

¹ Section 233.

² Section 238.

³ S. 255.

⁴ Section 201.

- (2) By the business of the agency being completed or by the expiration of the time for which the agent was appointed.
- (3) By the death or insanity of either the principal or the agent.
- (4) By the principal being adjudged an insolvent.

These points require a little explanation :—

(1) *Revocation and Renunciation* :—The principal can terminate an agency by revoking *i.e.* by withdrawing the authority given to the agent. But where an agent has himself an interest in the property which forms the subject matter of the agency, the principal cannot terminate the agency by revocation unless there was a contract before providing for such revocation. A gives authority to B to sell A's land so that B can take out of the proceeds the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his death or insanity, as B has an interest in the property as a creditor. Subject to this qualification a principal may revoke the authority given to his agent *at any time before the agent has exercised the authority so as to bind the principal*¹. The principal *cannot* revoke the authority given to his agent after the authority has been partly exercised by the agent in such a way that he has incurred personal liability and the revocation will expose him to loss or injury². A authorises B to buy 1,000 bales of cotton on account of A and to pay for it out of A's money remaining in B's hands. B buys 1000 bales of cotton in his own name so as to make him personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton. If, however, in the above case, B buys the cotton in A's name so as not to make himself personally liable, A can revoke B's authority to pay for the cotton.

The agent can also terminate the agency by renunciation, *i.e.* by giving notice to the principal of his unwillingness to act as agent.

Where the agency is fixed by contract to continue for a specified period, either the principal or the agent can previously terminate the agency by revocation in one case and renunciation in the other for a just cause. But if there is no just cause, the

¹ Section 203.

principal must make compensation to the agent if he revokes, and the agent must make compensation to the principal if he renounces, before the specified period¹.

Whether the principal revokes or the agent renounces, reasonable notice must be given by the one to the other; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Revocation and renunciation may be either expressed in words or in writing or may be implied in the conduct of the principal or the agent respectively. A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority².

Where an agent's authority is revoked, the revocation does not affect the rights and liabilities of the agent in relation to the principal until the agent is actually informed of the revocation, and the revocation does not affect the rights and liabilities of the general public with whom the agent deals, in relation to the principal, unless the notice of revocation reaches the public. A directs B to sell goods for him on a commission of 5% on the net proceeds. Later on A revokes B's authority by a letter. But before the letter reaches B, B sells the goods for Rs. 100/-. The sale is binding on A, and B is entitled to his commission. Let us assume that in the above instance C, a member of the public, knows that B has authority to sell A's goods. But C does not know of A's letter by which A revoked B's authority. He buys the goods from B for Rs. 100/-. B bolts with the money. As C was not informed of A's letter of revocation, his payment to B is good and he can keep the goods.

(2) If A employs B to sell his house or to manage his business for six months, B's agency will terminate after B has sold the house or managed the business for six months.

(3) The relation between an agent and the principal is entirely personal. Therefore, the death or incapacity like insanity of either terminates the agency.

(4) A person who has been adjudged an insolvent cannot act as a principal. Therefore, as soon as a person is adjudged an

¹ Section 205.

² Section 207.

insolvent, all persons who were before or at the time of his insolvency his agents, cease to be so after his adjudication as an insolvent.

Sub-Agent :

The general rule of law is that an agent cannot appoint another person to do his duties which he owes to his principal—*delegatus non potest delegare*—a delegate cannot delegate. But in some cases an agent can appoint a sub-agent to do his duties where it is usual according to the usual mode of business and custom. A, a cotton dealer in Bombay, has an agent B in Calcutta to sell cotton for him. There are many duties, like those undertaken by banks, which agents like B generally delegate to banking concerns. Or it may be that B has to appoint solicitors to do all the legal work for him in his business as an agent. The banks and the solicitors in this case are sub-agents.

A sub-agent has been defined in the Contract Act as a person who is a sub-agent. employed by and acting under the control of the original agent in the business of the agency.

Where a sub-agent has been properly appointed, *i.e.* where such appointment is usual, the sub-agent is only responsible to the agent and not to the principal. The agent, however, is responsible to the principal for the sub-agent. If the sub-agent is guilty of wilful wrong or fraud, the principal can directly hold him responsible.

Where an agent has express or implied authority to appoint a sub-agent and a sub-agent has been properly appointed, the principal is liable for all the acts of the sub-agent

in relation to third parties. But where an agent improperly appoints a sub-agent, *i.e.*, where he has no express or implied authority, or where it is not usual to appoint a sub-agent, the agent is liable for all the acts of the sub-agent both to the principal and third parties. The principal is not bound by or responsible for the acts of the person so employed, nor is that person responsible to the principal¹.

It should be carefully noted here that an agent can not only appoint a sub-agent where it is usual, he can also have authority,

¹ Sections 192, 193.

express or ~~implied~~, to nominate or select another person ~~to act~~ as agent for the principal. Where a person has been so nominated by an agent, he becomes *not a sub-agent, but an agent* of the principal, and he is related to the principal in the same way as the agent nominating or selecting him. In selecting such an agent for the principal, an agent must use such ordinary prudence as he would have done had he been the principal himself. If he does this he is not responsible to the principal for the acts or negligence of the agent so selected¹

Bailment :

Bailment' is a technical term of English Common Law, though literally it may mean any kind of handing over. The Indian Contract Act² defines a bailment as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the *bailor*.' The person to whom they are delivered is called the *bailee*.' A goes to Firpos for his lunch and leaves his hat with the cloak room attendant during the time he is having his lunch. Here A is the bailor, Firpos are the bailee, and the purpose for which the hat was bailed was that it might be kept when A has his lunch, and the hat has to be returned to A when he finishes his lunch and goes out.

If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment. Let us assume that in the above instance A goes to a hat shop and buys a hat already in the shop. He then leaves the hat in the shop for the shop owners to send it to his house. Here though A did not actually hand over the hat to the shop owners, yet the shop owners will be the bailees and A the bailor, because of the implied contract made by the shop owners to act as such. In this case A is deemed to have delivered the hat to the shop-owners *constructively by way of bailment*.

¹ Sections 194, 195.

² Section 148.

Delivery to bailee :

To constitute a contract of bailment delivery must be made to the bailee. This delivery may be either actual or constructive. Actual delivery means physically handing over the goods bailed to the bailee or someone so authorised to hold on his behalf, as when A, in our previous illustration, actually gives his hat to the cloak room attendant who is authorised to take the hat on behalf of Firpos. Constructive delivery means transferring possession without actually handing over the goods physically, as when A, in the above illustration, leaves the hat in the shop. The most important thing about delivery is that the bailor must transfer his possession to the bailee. Thus, I can deliver my motor car to a garage as my bailee by simply giving the garage people a delivery order to the warehouse, where my car is stocked.

Different kinds of bailment.

Bailment may be of different kinds and they may be classified as follows —

- (1) Bailment for safe custody or Bailment for use, and
- (2) Bailment for reward or gratuitous bailment

1. A bailment of the first kind arises when the bailor delivers an article to the bailee for simply keeping it in safe custody. A gives his camera to B for the latter to keep it in his custody for six months. This is a case of bailment for safe custody.

When, however, the bailor delivers an article to the bailee for the latter to use it in any specific or general way, it constitutes a bailment for use. Let us assume that in the above illustration A gives his camera to B for six months for the latter to use it in taking portraits. Here the bailment is a bailment for use.

2. Whether the bailment is for use or for safe custody, the bailee can either charge for his services or render them free. When the bailee charges for his services the bailment is a bailment for reward. When, however, the bailee does not charge anything, the bailment is gratuitous.

Duties or responsibilities of the bailor :

The bailor bears certain duties and responsibilities towards the bailee which may be enumerated as follows —

- (1) The bailor must disclose to the bailee faults in the goods bailed, of which the bailor is aware and which materially interfere

with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults

If, however, the goods are bailed for hire, the bailor is responsible for such damage not only where he was aware of the existence of such faults but also where *he was not aware* of the existence of such faults in the goods bailed¹

These two principles will be clear from the following examples :—

(a) A keeps with B certain boxes which A knew contained highly inflammable chemicals. A does not disclose to B that the boxes contain inflammable materials. Later on one of the boxes catches fire and B's store-house is gutted. A must make good the loss B sustains

(b) A hires a carriage of B. The carriage is unsafe though B is not aware of it, and A is injured. B is responsible to A for the injury, although he was not aware of the defect in the carriage, as the carriage was bailed out *on hire*

(2) The bailor must repay to the bailee all the expenses which the bailee has to incur when the conditions of the bailment are such that the goods are to be kept or work has to be done upon them by the bailee for the bailor, and the bailee will not receive any remuneration. A keeps his horse in B's stable and B agrees to this without any remuneration. But the horse has to be fed and looked after and A must repay to B all that the latter has to spend for keeping the horse even though B charges no remuneration for himself. Take for instance the case of bailment which involves the carrying of goods. B agrees to take and drive A's car to A's brother free of charge. But B has to buy petrol in order to drive the car to A's brother's place. A must repay to B the sum B has to spend on petrol².

(3) The bailor is responsible to the bailee for any loss which the bailee may sustain due to the following reasons³ :—

¹ Section 150.

² Section 158.

³ Section 164.

- (a) The bailor was not entitled to make bailment. A gives a car, which belongs to B, to C, an auctioneer, for the latter to put it on auction. C, believing that the car really belongs to A, sells the car on auction to a third person. B sues C for damages for the unauthorised sale. A must compensate C for any damages that the court may award against C.
- (b) The bailor was not entitled to receive back the goods.
- (c) The bailor was not entitled to give directions respecting the goods bailed.

Duties of the Bailee :

The bailee has certain duties towards the bailor. These may be set out as follows :—

(1) In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed¹. If the bailee takes as much care as a man of ordinary prudence, he is not responsible for the loss, destruction or deterioration of the thing bailed. But if he fails to take such care, he will be held responsible for all damages caused through want of such care². What is ordinary prudence is in every case determined by the court with reference to all the circumstances of the case, the usage and custom relating to the bailment of the goods in question and so on. Suppose A bails his goods to B for safe custody and B keeps them in this warehouse. Due to a chink in the roof of the warehouse, water trickles through and spoils the goods. B is responsible for the loss to A as the loss would not have been caused if B had used ordinary prudence in having the roof repaired. If, however, instead of water trickling through the chink, the goods were destroyed due to the warehouse being damaged by a cyclone. B would not have been responsible for the loss as B could not have prevented the cyclone by using ordinary prudence.

(2) If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest in proportion to their respective shares in

¹ Section 151.

² Section 152.

the mixture thus produced. A bails 20 seers of flour to B. B with A's consent mixes 10 seers of his own flour with A's. In the total mixture A's share will be $\frac{2}{3}$ and B's $\frac{1}{3}$ ¹

(3) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture. C bails 100 bales of cotton marked with a particular mark to B. B without C's consent, mixes the 100 bales with other bales of his own, bearing a different mark. C is entitled to have his 100 bales returned, and B is bound to bear all the expenses incurred in the separation of the bales and any other incidental damage²

(4) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods. A bails a barrel of cape flour worth Rs 45/- to B. B, without A's consent, mixes the flour with country flour of his own worth only 25/- a barrel. B must compensate A for the loss of his flour³

(5) The bailee must return or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished⁴

(6) The bailee is bound to return, deliver or tender the goods bailed at the proper time. If he fails to do that, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time⁵.

(7) The bailee is bound to deliver to the bailor or anyone whom the bailor directs, any increase of profit which may have accrued from the goods bailed. A leaves a cow in the custody of B to be taken care of. The cow gives birth to a calf. B is bound to deliver the cow as well as the calf to A⁶

¹ Section 155.

² Section 156.

³ Section 157.

⁴ Section 160.

⁵ Section 161.

⁶ Section 163.

(8) The bailee must compensate for the loss of the bailor if the loss is caused due to some act not authorised by the contract of bailment. A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse. If the bailee does some act which is not only unauthorised but also inconsistent with the contract of bailment, the bailor, in addition to his remedy of compensation, can also treat the contract as void at his option. A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. Using the horse to draw a carriage is inconsistent with the agreement to use the horse for riding. If the horse is injured A is entitled to compensation. But A has another remedy. Whether the horse is injured or not, A can treat the contract as void, *i.e.*, he can bring back the horse even though the time for which the horse was let out has not expired¹

Termination of Bailment :

A bailment contract comes to an end in the following ways :—

(1) When the time for which the goods were bailed has expired, or the purpose for which the goods were bailed has been accomplished, the contract of bailment comes to an end. A lends B his tractor plough for twelve months. The bailment will terminate on the expiry of twelve months. A lends B his tractor plough for B to plough his piece of land. The bailment will terminate as soon as B has finished ploughing his land.

(2) A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

(3) When a bailee does an act inconsistent with the contract of bailment, the bailor can terminate the bailment at his option. (See *ante* "duties of the bailee").

Bailee's Particular Lien :

When a bailee has rendered services, in pursuance to the bailment contract, involving exercise of labour and skill, the bailee has, unless he has contracted to render such services free, a right

¹ Sections 153 and 154.

to retain the goods bailed until he receives due remuneration for services he has rendered¹.

A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone until he is paid for his services.

We have seen above that a bailee can retain the goods until he is paid for the services he has rendered in connection with the

goods. The bailee cannot, however as a general rule, retain the goods for unpaid amounts due from the bailor in regard to other accounts or in regard to services rendered in connection with other goods.

Therefore, generally a bailee's lien is *particular*. But bankers, solicitors, factors, wharfingers² and policy-brokers have a *general* lien. They can retain goods or securities of their customers on account of debts which are not in any way connected with the goods or securities in question. A deposits a few shares to get an advance of Rs. 1000/- from a bank. A repays the advance later on. But it is found that A had previously taken an advance of Rs. 500/- without any security. The bank may retain the shares until A repays the previous advance of Rs. 500/-. In the same way, a solicitor can retain all the papers and documents of his client in his hands until he is paid his fees. Thus, this class of persons can retain the goods not only against a *particular account* but also against a *general balance of account*. Excepting the bailees mentioned above no other bailees enjoy a general lien. Goods retained on general lien cannot be sold for the realisation of dues. They can only be retained. Goods retained on particular lien can be sold if there is an agreement to that effect³.

Bailment of Pledges :

The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor in this case is called the 'pawnor' and the bailee is called the 'pawnee'.⁴

The rights of the pawnee may be stated as follows :—

¹ Section 170.

² Owner of wooden³ or stone platform beside which ships are moored for loading or unloading cargo.

³ Section 171.

⁴ Section 172.

- (a) The pawnee may retain the goods pledged not only for payment of the debt or performance of the promise, but for interest on the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged. But the pawnee cannot, unless there is a contract to the contrary, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged¹
- (b) The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged
- (c) If the pawnor makes default in payment of the debt or performance at the stipulated time of the promise, the pawnee may bring a suit against the pawnor upon the debt or promise and retain the goods pledged as security, or he may sell the goods by giving the pawnor reasonable notice. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of sale are greater than the amount of due, the pawnee shall pay over the surplus to the pawnor

Where the pawnor fails to pay his debt or perform his promise at the stipulated time, he has the right to pay his debt or perform his promise at any time before the sale of the goods pledged and redeem the goods

¹ Sections 173 and 174.

CHAPTER II

SALE OF GOODS

(Indian Sale of Goods Act)

History :

The Indian law regarding the sale of goods was, until the passing of the Indian Sale of Goods Act, 1930, contained in Chapter VII of the Indian Contract Act of 1872. In 1926 'an exhaustive examination of the case law bearing on certain portions of the Indian Contract Act, 1872, including Chapter VII, which embodies law relating to the sale of goods, was made in the Legislative Department under the supervision of the late Mr S. R. Das, the then Law Member of the Executive Council of the Governor-General. In 1928 the results of that examination were considered by the late Sir Dinshaw Mulla, at that time holding the office of the Law Member. A draft bill was prepared on the lines of the English Sale of Goods Act, 1893, embodying the provisions of law relating to the sale of goods in a separate enactment'. The draft bill, after going through a select committee was ultimately passed and became the Indian Sale of Goods Act, 1930. Before the passing of the Indian Contract Act, 1872, Chapter VII of which contained the law relating to the sale of goods or moveables, the law on this subject was not only not uniform throughout British India, but was also, outside the limits of the Original Jurisdiction of the High Court, extremely uncertain in its application. Within the limits of the Presidency towns, the rules of English law including those in Statute of Frauds, were applied, whilst in the mofussil, it was doubtful whether the Statute of Frauds was applicable. To remedy this unsatisfactory state of affairs, Chapter VII of the Indian Contract Act was framed and except in regard to the rule as to market overt, the law embodied in Chapter VII represented generally the English law on the subject as it then stood.

A contract for sale of goods is not a separate kind of contract. It is only a species of the wider kingdom of contracts and it is governed by all the rules of law which appertain to contracts in general. The reason why a separate law for sale of goods exists, is that a contract for sale of goods has certain peculiar features.

continues to be the subject to which the property in the goods is to be transferred.

(3) A sale of goods always means a sale of moveable property. Goods means moveable property and never include immovable property.

(4) The consideration for sale of goods is always a price in terms of money. Exchange of goods by barter does not constitute a sale of goods.

Formation of a Contract :

A contract of sale is made in the same way as any other contract by an offer to buy or sell goods for price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or the immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed. The contract may be in writing or by word of mouth or may be implied from the conduct of the parties¹.

Subject matter of a Contract :

Goods, as we have already seen, form the subject matter of a contract of sale. Goods to be sold may or may not exist. I may sell cycles that are in my godown, or I may agree to sell cycles which I expect to arrive from England two months hence. I may even agree to sell goods which I shall acquire on the happening of a contingency e.g. my father has got a few copies of Shakespeare's first edition. I hope to get them on my father's death. I may contract to sell them even before my father dies. Non-existent goods sold are called future goods. Future goods are defined as goods to be manufactured or produced or acquired by the seller after making of a contract of sale. A sale of future goods is nothing but an agreement to sell the goods.

When there is a contract for the sale of specific goods, the contract is said to be a sale of specific goods. Goods are specific when they are identified by the seller before the contract is made, or when they are identified by the buyer before the contract is made, or when they are identified by the seller and the buyer together before the contract is made.

the ring and put it into a deliverable state and A has notice thereof.

(c) Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

(d) When goods are delivered to the buyer on terms, e.g., "sale on approval" or "on sale or return" or other similar terms, the property therein passes to the buyer—

(i) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;

(ii) If he does not signify his approval or acceptance to the seller but retains the goods without giving the seller any notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Let us illustrate the above. Thacker Spink & Co. of Calcutta sends a copy of Galsworthy's Forsyte Saga to A at Dacca to be kept or returned within a fortnight on A's request to send a good book for approval. If A accepts the book and lets Thacker Spink & Co. know about it, the property in the book will at once pass to A. If A retains the book without informing Thacker Spink & Co. whether he wants to accept or reject the book, the property will pass to A after the expiry of a fortnight. If, however, no time was mentioned within which the book should be returned and A neither accepted nor rejected the book, the property in the book will pass to A on the expiry of a reasonable time. What is a reasonable time will, of course, depend in every case on the general usage of the trade and all other circumstances of the case.

Passing of property in unascertained goods.

In the case of unascertained goods, property in them does not pass until they are ascertained. It is said in *Re A's Trusts* (1894) 1 Q.B. 110, "The property in the goods does not pass until they are ascertained".

A's godown. Property in the glass would not pass to B until he has selected his glass from all the glasses in the godown. Unascertained goods and future goods, though they may be specific, are in the same category for the purpose of determining the time at which property in them passes and the following should be remembered in this connection.

Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such an assent may be expressed or implied and may be given either before or after the appropriation is made.

Where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract¹

Unconditional Appropriation :

When one man sells to another goods which are not specifically defined, it is necessary that they should, in some manner, agree upon what is to be delivered in fulfilment of the contract, for until this is done, there are no goods on which the contract can attach."²

When, however, the goods to be delivered under the contract are identified by the parties, as the subject matter of the contract of sale, and nothing further remains to be done by the seller to pass the property, the property will pass to the buyer unless a contrary intention is expressed. It is the act of identifying the subject matter of sale by mutual consent, so that it may become clear as to on what the contract will attach which, is known as unconditional appropriation. In *Shankardass Jyoti Prasad vs. Bhanoram Shewdial*³, the facts were as follows :-

A contract of sale for 814 tins of oil which were not at the

¹ Section 23 (5) & (2).

² *Shankardass Jyoti Prasad vs. Bhanoram Shewdial*, 124.

³ (1913) 124 Ind. 124.

time of the contract in the possession of the seller was entered into by the parties on the 6th of May. The buyer paid the price at the time of the contract. Subsequent to the contract the seller got the Railway receipt for the goods despatched to the buyer earlier and endorsed the same and sent it to the buyer. Thereafter the goods were destroyed by fire while in transit. It was decided that the property had passed to the buyer as soon as the Railway receipt was sent to him and he had to bear the loss.

It should be noted, however, that the passing of property does not depend on the payment of the price or on the fact of delivery, and property may pass from the seller to the buyer even if the seller refuses to deliver except on payment of price. For the right of the seller to retain property may be quite consistent with the transfer of property.

Reserving the right of disposal :

Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods, until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee, for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Where the goods are shipped and by the Bill of Lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal. Where the seller of goods draws on the buyer for the price and transmits the Bill of Exchange and the Bill of Lading to the buyer together to secure acceptance or payment of the Bill of Exchange, the buyer is bound to return the Bill of Lading, if he does not honour the Bill of Exchange and if he wrongfully retains the Bill of Lading the property in the goods does not pass to him¹.

The above law is an exception to the rule that the property in the goods passes on appropriation of the goods to the contract on the principle that only an unconditional appropriation has the effect of passing the property. If the appropriation is condi-

tional, then the seller retains the right of disposing the goods and the property will not pass to the buyer unless the conditions of appropriation are fulfilled. The conditions may be of various types and the examples afforded by Section 25 given in paragraphs 2 & 3 above are merely illustrations. When the right of disposal is reserved by attaching the conditions to appropriation, it is said that the seller has reserved the right of disposal. The law regarding reserving the right of disposal has been stated by Cotton, L. J. in *Mirabita v. Imperial Automan Bank*¹ as follows —

“Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree, as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bills of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order and does not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself the power of disposing of the property, and that consequently there is no final appropriation and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait v. Baker*², *Ellershaw v. Magnia*³ and *Garbarron v. Kreeft*⁴ (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract

¹ (1878) 3 Ex. Div. 164.

² (1848) 2 Ex. 1.

³ (1843) 6 Ex. 578.

⁴ (1877) L.R. 10 Ex. 274.

price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till the acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser ; and so it was decided in *Turner vs. Trustees of Liverpool Docks*, *Shepherd vs. Harrison*, *Ogg vs. Shutter*. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done ; and in my opinion, under such circumstances the property does on payment or tender of the price pass to the purchaser."

In *Shepherd vs. Harrison*¹, the facts were as follows :

The seller shipped a quantity of cotton on account of and at the risk of the buyer. The bill of lading was made to the order of the seller and was endorsed to the bank with a Bill of Exchange attached and sent to the buyer. The buyer retained the bill of lading but returned the Bill of Exchange unaccepted. It was held that the property in the cotton had not passed to the buyer.

It is evident from what we have said that property does not necessarily pass to the buyer when the price is paid or the goods are delivered. The price may be paid before, after, or at the time the actual sale takes place. The Vauxhall Car Company are bringing out a special type of cars. I anticipate that the demand for the cars will be so great that there will be hardly any car left in the market as soon as the car is placed on the market. I send the advertised sum of £150/- to Vauxhall Car Co., in advance on condition that as soon as the car will come in the market, the company will deliver me a car. The sale will be complete when the car will be delivered to me and not when

¹ (1871) L.R. 5 H.L. 116.

I have paid the price. In the same way, I may buy the car on credit and pay the price after the sale, or I may buy the car cash and pay the price at the time of the sale. Similarly, delivery may take place before, after, or at the time of the sale. I want to buy a typewriter. A firm sends me a typewriter to keep it if I buy it and return it in case I do not want to buy. If I buy the typewriter and pay the price, delivery would be before the sale or before the property passes to me. Similarly, I may buy the typewriter and pay the price first, and delivery of the typewriter to my house may take place later. Here property in the typewriter will pass to me immediately after I buy the typewriter, but the transfer of the possession of the typewriter takes place later. Delivery at the time of the sale is very common. In this case transfer of property and transfer of possession occur at the same time.

Passing of Title :

The general law is that one who has no title to goods cannot himself give to another a better title. Therefore, if goods are sold by any one who is neither the true owner nor an agent of the owner authorised to sell, the buyer will acquire no title over the goods. In *Cundy v. Lindsay*¹ the facts were as follows :—

One Alfred Blenkarn, writing from an address which he gave as 37, Wood Street, Cheapside, and signing his name, so that it looked like Blenkiron & Co., ordered some goods from the plaintiff. At 123 Wood Street were the premises of a reputable firm W. Blenkiron & Co. The plaintiff consigned the goods to Messrs Blenkiron & Co., 37 Wood Street, and Blenkarn obtained possession of them and re-sold to the defendants who bought in good faith. It was held that the defendants acquired no title as against the plaintiff. There are, however, some exceptions to this rule which might be stated as follows.

¹(a) Estoppel : A buyer buying goods from one who is not the owner may still acquire a valid title, where, by the conduct of the owner, the buyer was led to believe that the seller was the true owner. B sells A's car to C. A was present at the sale. He keeps either silent or encourages C to buy the car. By his conduct C is led to believe that B is the owner of the car.

¹ (1898) 13 A.C. 413.

~~There~~ A, by his conduct, is estopped from denying B's authority to sell the car, and C acquires a perfectly valid title against A.

In *Commonwealth Trusts Ltd vs Akotey*¹ the facts were as follows —

A sold a quantity of cocoa to B and consigned the same by railway and sent the railway receipts to B before any agreement was arrived at as to the price. B sold the cocoa to C and delivered the railway receipts to him. It was contended on behalf of A that, as there was no contract between A and B since the price was not fixed, the property in the goods did not pass to B and, therefore, C acquired no valid title. It was held that by his conduct A was estopped from disputing B's title to the cocoa and C had acquired a valid title.

✓(b) Sale by a mercantile agent. A mercantile agent is deemed in law to have the implied authority of his principal to sell his goods where the agent is in possession of the goods or the documents of title to the goods with the consent of the principal. He can sell and pass a valid title to the buyer even where he had no authority to sell, provided the buyer did not know that and acted in good faith. This is also a special case of estoppel. The owner of the goods by giving possession of the goods to his agent impliedly leads the buyer to believe that the agent has authority to sell and he is, as such, estopped from denying the title of the buyer².

In *Folks vs King*³ the facts were as follows:—

The plaintiff handed over a motor car to a mercantile agent for sale on condition that the car should not be sold below a specified price. The agent agreed to do so but sold it below such price to A and misappropriated the proceeds. A bought the car in good faith and re sold it to the defendant. It was held that the plaintiff could not recover the car from the defendant.

✓(c) Sale by one joint owner. Where several persons are joint owners of goods and one of the joint owners is in possession of the goods with the consent of the other owners, the joint-owner who has possession of the goods can sell and pass a valid title to anyone who buys of him *in ignorance that the seller was only a*

¹ (1926) A.C. 72 P.C.

² Section 27.

³ (1923) 1 K.B. 282 C.A.

~~joint-owner and had no authority to sell.~~ Here also the ~~other~~ joint-owners, by putting the seller in possession of the goods, ~~are~~ estopped from denying the title of the buyer, as their conduct induced the belief in the buyer that the seller had a full authority to sell.

(d) Sale by person under void and voidable contracts.: We have seen before that certain contracts are void and certain contracts are voidable. Void contracts are void from the outset and voidable contracts are valid until the party entitled to repudiate it actually avoids it.

A person who acquires goods on a voidable contract can pass a valid title to a buyer provided the same takes place before the contract is repudiated by the original seller. In *Phillips v. Brooks*¹ the facts were as follows —

A fraudulent person, North, entered into a jeweller's shop and looked at certain jewels which the jeweller was prepared to sell to him individually as a casual customer. North then drew a cheque in the name of Sir George Bullough representing himself to be so, and took away one of the jewels. North then pledged the jewel with a pawn broker, who took it in good faith. It was held that the contract between the jeweller and North was not void but voidable for though the jeweller believed North to be Sir George Bullough yet he intended to sell North and hence the contract was not void for mistake as to the identity of the party but voidable for fraud and misrepresentation. It was, therefore, decided that the pawn broker obtained a good title as he took the jewel before the jeweller repudiated the contract.

But a person who acquires the goods under a void contract cannot, at any time, pass a valid title to a buyer. A goes to a jeweller's shop and introduces himself say as Lord Halifax and induces the jeweller on such misrepresentation to let him have the jewel on credit. A sells the jewel afterwards to C. C cannot have a valid title against the jeweller as the contract between A and the jeweller was void *ab initio* for mistake as to the identity of party².

(e) Seller in possession after sale : If the seller continues to be or is in possession of the goods or of the documents of title to

¹ (1891) 2 K.B. 241.

² *Shankar Lal v. Ramji*, (1927), A.C. 467.

the goods after the sale, a subsequent buyer purchasing from such seller or from his agent acquires a valid title against the former buyer, provided he had no notice of the previous sale and had acted in good faith.

(f) Buyer in possession after sale : In the same way, if a buyer is in possession of goods with the consent of the seller under an agreement for sale, he can pass a valid title to a third person who has no notice of the original seller's rights or lien. This is illustrated by the case of "*Hire purchase agreements*". A hire purchase agreement is a transaction by which the buyer gets possession of the goods immediately and the price is paid in several instalments. Until the entire price is paid the seller retains the ownership of the goods. But since the buyer is in possession of the goods he can pass a valid title to a third person who buys the goods in good faith and without notice that the goods were subject to hire purchase agreement.

Sometimes goods are hired and a certain sum is paid at regular intervals as a charge for the hire. I hire a radio from a shop and I pay Rs. 2/- as charge for the hire. In this case too possession is transferred to me. In fact the transaction actually looks like a hire purchase agreement. But I cannot pass a valid title to a third person by selling the radio to him, for the transaction was never a sale but only a contract for hire at a stated charge.

Conditions and Warranties :

We have discussed before how contracts subject to certain conditions are discharged due to non-fulfilment of those conditions. We also had occasion to say that all stipulations to which contracts may be subject are not conditions'. A stipulation or a term relating to the subject matter of contract and, in the case of sale of goods, to the subject matter of sale may be either a condition or a warranty.

1. A condition is a term of the contract which goes so directly to the root of the contract or is so essential to its very nature that if the condition is not fulfilled the contract is discharged.

A warranty is a term of the contract which is independent

and subsidiary or collateral to the main purpose of the contract, i.e., which is not so essential as to discharge the contract if the warranty is not fulfilled.

3. Whether a term is a condition or a warranty depends solely upon what was the intention of the parties. Let us take a simple case. A sells a car to B and says, "It runs thirty miles per gallon of petrol". It turns out that the car does not run more than twenty-five miles a gallon. A's statement is merely a warranty, for the parties never intended that the sale of the car would depend on the car running thirty miles per gallon. A's statement was independent and collateral to the main contract of the sale. Therefore, B is not entitled to repudiate the contract. He will have to keep the car. If he has paid the price, he may sue A for damages for breach of warranty. If he has not paid the price he can set up the breach of warranty in diminution of the price. If, on the other hand, B had said, "I will not take the car unless it runs thirty miles per gallon," and A replied, "Yes it runs thirty miles per gallon," the stipulation about the car running thirty miles per gallon would amount to a condition. B could then repudiate the contract if the car did not run thirty miles per gallon, refuse to take the car and recover the price, if he had paid it, and sue A for damages for breach of contract.

But in some cases breach of warranty may amount to misrepresentation and the party injured by misrepresentation may always repudiate the contract. Let us again consider our first illustration. If A says to B first that the car runs thirty miles per gallon and then B buys the car, it is natural to infer that A's statement induced B to enter into the contract. Therefore, if the car does not run thirty miles a gallon the breach of warranty will also amount to misrepresentation and B in such a case can repudiate the contract though the stipulation is not a condition.

It is, therefore, evident that the distinction between a condition and a warranty is important in so far as the rights of parties are concerned in case of a breach of either. A breach of condition, as we have seen above, entitles the injured party to avoid the contract, and sue the other party for damages for breach of contract. A breach of warranty, on the other hand, does not entitle the injured party to repudiate the contract. The injured party is only entitled to recover damages for the breach.

Every contract of sale is subject to any condition to be

fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated¹. This means that the buyer can always dispense with the performance of a condition inserted in the contract for his sole benefit and treat the breach of condition as only a breach of warranty which entitles him to compensation. In some cases the buyer has to compulsorily waive a condition and to preclude himself from repudiating the contract as a result of a breach of condition, where he does something which is contrary to the seller's right to the property in the goods, such as when he re-sells the goods to a third party or exercises some right of proprietary character.

Where also a contract of sale is not separable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, expressed or implied to that effect². (In the case of *Street v. Blake*³, it was held that it is a well settled rule of English law that in the case of sale of specific goods, the buyer cannot repudiate the contract for non-performance of a condition where the property in the goods has already passed to the buyer unless there is a stipulation in the contract entitling him to do so. The breach of condition in such a case is to be treated as a breach of warranty entitling the buyer to pecuniary compensation only.)

Conditions and warranties may be either express or implied. We have seen before⁴ that coronation cases illustrate implied conditions. They are in every case gathered from the intention of the parties and from all the circumstances. In the case of sale of goods the general rule is that there is no implied condition or warranty as regards the quality or fitness of goods sold. Unless the seller actually commits misrepresentation to induce the buyer to buy, the seller is under no obligation to guarantee the quality

¹ Section 13 (1).

² Section 13 (2).

³ (1937) 2 B. & Ad. 456.

⁴ See ante "Law of Contract."

or fitness of the goods supplied. The buyer must look for himself and test the quality of goods he buys. The principle of *Caveat Emptor* applies¹.

But the Sale of Goods Act provides for certain implied conditions and warranties unless there is any contract to the contrary

Implied conditions :

1 There is an implied condition that, in every case of sale the seller has a right to sell the goods, and in every case of an agreement to sell, the seller will have a right to sell at the time when the property in the goods is to pass. This does not mean that the seller should be the owner of the goods. The seller might be an agent of the owner authorised to sell the goods.

In *Roland v. Vidoll*² the facts were as follows —

The defendant sold a motor car to the plaintiff. After some time the plaintiff discovered that the car was stolen and he was compelled to return it to the true owner. It was held that the contract could be repudiated by the plaintiff for non-fulfilment of the condition regarding title and he could recover the price from the defendant.

2 There is an implied condition that in a sale of goods by description, the goods shall correspond with the description; and if the sale is by sample as well as by description, the goods shall correspond with both the sample and the description³.

It is not enough that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. A contracts to sell B Java sugar according to the sample produced by him. The sugar, when delivered, agrees with the sample but is not Java sugar. In this case, though the goods agree with the sample, yet they do not correspond with the description, and hence B, the buyer, is entitled to reject the goods for non-fulfilment of conditions. In *Nichol v. Godts*⁴ the facts were as follows :—

¹ See *supra* "Law of Contract."

² Section 14 (a).

³ (1923) 2 K.B. 500 C.A.

⁴ Section 15.

⁵ (1891) 15 Q.B. 191.

A sold a quantity of foreign refined rape oil warranted ~~only~~ to be equal to samples. The samples contained an admixture of hemp oil and the bulk corresponded with them. It was held that, though the oil was equal to sample, yet it did not correspond with the description, and hence the buyer was entitled to reject the oil.

3. Generally there is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. The general law is "*Caveat Emptor*". But where the buyer makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the skill and judgment of the seller, and such goods are normally sold by the seller, there is an implied condition that the goods will be reasonably fit for such purpose. I want a push chair for an invalid. I go to a shop where push chairs are normally sold. I tell the shopkeeper that the chair is needed to carry an invalid about. I also rely on the skill and judgment of the seller and ask him to give me a push chair fit for the purpose of carrying an invalid. Here if the shopkeeper sells a push chair to me, there will be an implied condition that the push chair is fit for carrying an invalid about. But where a specific article is sold under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose¹.

In *Chanter vs. Hopkins*² the facts were as follows:—

A placed an order with B for the latter's smoke consuming furnace to fit up with the former's brewing machine. The furnace was patented but it proved useless for the purpose of brewery. It was held that the buyer had no remedy against the seller as the goods were sold under its patent.

4. There is an implied condition in case of a sale by description that the goods shall be of merchantable quality. Provided the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed³.

A sale by description means that a fair sketch or account of the goods is given by words or in writing.

In *Peer Mohammad vs. Dalcoram*⁴ it was held that the condition regarding merchantability was broken where black yarn was

¹ 1871).
² 11 L. R. 77, 309.

sold by description and the same was found damaged by white ants.

In *Thornett & Fehr vs. Beers & Sons*¹, however, a buyer was given the inspection of certain barrels of glue which were not of merchantable quality. The buyer inspected the outside of the barrels only and if the barrels were opened it would have shown the condition of the glue. It was held that under the circumstances there was a breach of implied condition regarding merchantability.

5 Besides the implied conditions mentioned above, an implied condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade to any contract of sale².

6 A contract for sale by sample means that the goods sold are fairly represented by the piece shown as sample. It means that the thing sold is of the same kind and essentially of the same quality as the specimen which the seller showed as sample. In a contract for sale by sample there is an implied condition—

(a) That the bulk shall correspond with the sample in quality :

(b) That the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;

(c) That the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. In *Mody vs. Gregson*³ the defendants agreed to manufacture and supply, 2,500 pieces of grey shirting according to sample at 18s. 6d. per piece, each piece to weigh seven pounds. The goods were delivered and the plaintiff accepted them as answering the sample. But it was found later that the goods contained china clay to the extent of 15 per cent of their weight, introduced for the purpose only of making them weigh seven pounds. It was held that the defect could not be apparent on reasonable examination of the sample and as such the implied condition regarding merchantability was broken.

Implied Warranty :—(1) In a contract of sale there is an implied warranty—

(a) that the buyer shall have and enjoy quiet possession of the goods. This means that the seller must pay damages for

¹ (1919) 1 K.B. 406.

² Section 13(2).

³ L.R. 10 Q.B. 542.

breach of warranty if the buyer suffers from the consequences of a defective title;

(b) That the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

*(2) An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade. Thus in *Jones vs. Bowden*¹ it was shown that in auction sales of certain drugs, as pigments, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. Fair samples had been shown, but sea-damage could not be detected by examination. The court held, on this evidence, that freedom from sea-damage was an implied warranty in the sale.

Rights and duties arising out of a contract of sale :

The Indian Sale of Goods Act confers certain rights and duties on the buyer and the seller respectively. Since the buyer and the seller are the only two parties in a contract of sale, it is easy to understand that what is the right of the buyer is actually the duty of the seller, and what is the right of the seller is actually the duty of the buyer. Therefore we shall deal with the rights of the buyer (*i.e.*, the duties of the seller) first and deal with the rights of the seller (*i.e.*, the duties of the buyer) next.

Rights of the buyer :

The rights of the buyer may be enumerated as follows :

Right of the buyer regarding delivery : It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale².

Delivery : Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods³.

Delivery of goods sold may be made by doing anything which,

¹ (1903) 1. K.B. 610.

² Section 31.

³ *Quidam* 27

Delivery how made the parties agree, shall be treated as delivery of which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. Even the handing over of the key of a car may be agreed to as a delivery of the car¹.

A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but

Part delivery a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder². The intention of severing the part from the whole is to be gathered from the facts and circumstances of the case. A sells 10 tons of coal to B. A's lorry can carry only one ton at a time. So he delivers one ton of coal first in progress of delivering the rest. The delivery of one ton will operate as delivery of the whole lot. But suppose A delivers one ton to get payment for the one ton first, so that he may do so with regard to the remaining 9 tons. The delivery of the one ton of coal this time will not operate as delivery of the whole lot as A's intention is to sever one ton from the rest.

Rules as to delivery :

In a contract of sale, the contract can always provide as to whether the seller should deliver or the buyer should take possession, or whether the goods are to be delivered at

Place of delivery a particular place or at the place where the sale took place. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence at the place at which they are manufactured or produced³.

The seller of goods is not bound to deliver them until the buyer applies for delivery, unless there is a contract to the contrary.⁴

Time of delivery Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.⁵ When the buyer demands delivery or when

¹ Section 33.

² Section 34.

³ Section 35.

⁴ Section 35.

⁵ Section 36(2).

the seller tenders delivery, such demand or tender must be done at a reasonable hour. What is a reasonable hour is a question of fact¹.

Where a seller sells goods which are in the possession of a third person, there is no delivery by seller to buyer, unless and until such third person acknowledges to the buyer that he holds the goods on his behalf².

The expenses of and incidental to putting the goods into a deliverable state is to be borne by the seller unless there is an agreement to the contrary³.

Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts delivery he has to pay for them at the contract rate. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate. A agrees to sell 10 tons of coal to B at Rs. 4/- a ton. A, however, delivers only 8 tons. B can reject the delivery. But if B accepts delivery he must pay for the 8 tons at the contract rate of Rs. 4/- a ton, i.e. he must pay Rs. 32/- in all. But suppose A delivers 12 tons instead of 8 tons as above. Here B can keep 10 tons out of the 12 tons, i.e., the quantity fixed in the contract and reject the remaining two tons; or B can reject the whole quantity; or B can accept the whole of the 12 tons. If, however, B accepts the whole of the 12 tons, B must pay at Rs. 4/- a ton, i.e., he must pay Rs. 48/- in all.

The seller may, instead of delivering a smaller or a larger quantity, deliver to the buyer the goods he contracted to sell mixed with goods of different description not included in the contract. In such a case the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole. All these rules may, however, be varied by any usage of trade, special agreement or course of dealing between the parties⁴.

¹ Section 36(4).

² Section 36(3).

³ Section 36(5).

⁴ Section 37.

Generally, in the absence of any contract, the buyer of goods is not bound to accept delivery thereof by instalments. But there may be contracts whereby delivery by instalments may be stipulated.

Instalment deliveries.

Where there is a contract for the sale of goods to be delivered by stated instalments,—each instalment to be paid separately—a delicate question arises in each of the following two cases :

(a) If the seller makes no delivery or makes a defective delivery in respect of one or more instalments, the question in every case is whether it is to be regarded that the seller has broken the whole contract or whether the breach in respect of the delivery of one or more instalments can be separated from the contract and treated as a partial breach. Whether it is a breach of the whole contract or only a partial breach relating to one or more instalments will depend on the terms of the contract and all the circumstances of the case. If it is found that it is a repudiation of the whole contract, the buyer can treat the contract as at an end. If, however, it amounts to only a partial breach, the buyer cannot put an end to the contract of sale. He can only claim damages for partial breach.

(b) If the buyer neglects or refuses to take delivery or pay for one or more instalments, it is similarly a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a partial or a severable breach giving rise to a claim for compensation only, but not to a right to treat the whole contract as repudiated¹

Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer²

Delivery to carrier or wharfinger.

In the absence of any contract between the buyer and the seller, the Sale of Goods Act lays down the following rules as to who should bear the loss in case goods are damaged during transit from the seller to the buyer :

Loss or damage during transit.

¹ Section 38.

² Section 39.

(a) Where goods are delivered to a carrier for transmission to the buyer (as stated above) or deposited with a wharfinger for safe custody, the seller must make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or the wharfinger as a delivery to himself, or may hold the seller responsible for such loss or damage¹.

(b) Where goods are sent by the seller to the buyer by a route involving sea transit in circumstances in which it is usual to insure, the seller must inform the buyer of goods so that the latter may insure in time. If the seller fails to inform and the buyer does not insure, the seller must bear all the loss incidental to the transit².

(c) Where the seller agrees to deliver the goods at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of *deterioration* in the goods incidental to the transit³. Here the risk referred to is only the risk of deterioration and not of total loss. If the goods are totally lost the seller must bear the risk.

Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. The seller is bound to afford to the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract, unless otherwise agreed. If the buyer does not examine the goods in spite of reasonable opportunity being given by the seller, the buyer is deemed to have accepted the goods⁴. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have

Buyer's right of examining the goods.

¹ Section 39 (2).

² Section 39 (3).

³ Section 40.

⁴ Section 41.

been delivered to him and he does any act which is inconsistent with the ownership of the seller, *e.g.* when he sells the goods to a third person, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them¹.

Unless otherwise agreed, where goods are delivered to the buyer and the buyer refuses to accept them, the buyer is not bound to return rejected goods. But the buyer, in such a case, must inform the seller of his refusal to accept².

Rights of the Seller :

(1) The seller is entitled to payment of the price at the same time as he delivers the goods unless otherwise agreed³.

If the buyer fails to pay, the seller can always sue for the price.

(2) The seller is entitled to compensation if the buyer refuses to accept delivery of the goods sold⁴.

(3) The seller is entitled to a reasonable rate of interest on the total price of the goods sold from the day of the delivery of the goods or from the day on which the price was to have been paid⁵.

Unpaid Seller :

A seller of goods is deemed to be an unpaid seller—

(1) when the whole of the price has not been paid or tendered ; or

(2) when a bill of exchange or other negotiable instrument, *e.g.*, a cheque, has been accepted by the seller as conditional payment, and the condition on which it was accepted has not been fulfilled by reason of the dishonour of the instrument or otherwise⁶.
A sells 1 md. of rice to B for Rs. 8/-. B pays Rs. 8/- by cheque. A accepts the cheque. A's acceptance means that he accepts payment of the price for 1 md. of rice on condition that the cheque will be paid. If the cheque is dishonoured, A will become an

¹ Section 42.

² Section 43.

³ Section 32.

⁴ Section 56.

⁵ Section 61.

⁶ Section 45 (1).

unpaid seller. A seller includes any person who is in the position of a seller, e.g., an agent of the seller to whom the bill of lading has been endorsed¹.

Unpaid Seller's Rights :

(A) An unpaid seller has the following rights notwithstanding that the property in the goods may have passed to the buyer

- (i) He has a lien on the goods for the price while he is in possession of them
- (ii) He has a right of stopping the goods in transit after he has parted with the possession of them in case of the insolvency of the buyer
- (iii) He has a right to resell the goods in some cases as defined by the Sale of Goods Act
- (iv) He can sue the buyer for the price of the goods

(B) An unpaid seller has the following rights when he has parted neither with the possession nor with the property in the goods-

- (i) He is entitled to compensation if the buyer refuses to accept delivery²
- (ii) He has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit *where the property has passed to the buyer*

Let us discuss each of the rights separately

Seller's lien :

A (i) Lien means a right exercised by one over someone else's property. A seller's lien arises, therefore, only when the property in the goods passes to the buyer. A seller's lien means that an unpaid seller, who is in *possession* of the goods sold but who has ceased to be the owner of such goods, is entitled to *retain* possession of them until payment or tender of the price in the following cases³ —

- ↓ (a) Where the goods have been sold on cash basis and without any stipulation as to credit. A sells 50 bushels of wheat to B for £30/- to be paid cash. B fails to pay. A can retain the wheat.
- ↓ (b) Where the goods have been sold on credit, but the term

¹ Section 45 (2).

² Section 46.

³ Section 56.

⁴ Section 47.

of credit, i.e., the period during which credit transactions at he be operative, has expired. A sells 50 bushels of wheat to B at £10/- on credit, provided that the price is paid within three months. The term of credit will expire after three months. If within three months B fails to pay the price and A is still in possession of the wheat, A can retain the wheat until the price is paid.

(c) Where the buyer becomes insolvent

Where an unpaid seller has made part delivery of the goods, he may retain the rest in his possession unless the circumstances relating to such part delivery show that the seller agreed not to exercise his lien¹.

(d) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

The right of lien is an incident of actual possession by the seller and is not an incident of title and it can be exercised by the seller even though the property in the goods has passed to the buyer. It has accordingly been held in *Le Gault vs Harvey*² that the giving of a delivery order by a seller to a buyer does not of itself give the buyer such a possession of the goods as can deprive the seller of his lien for the unpaid price. The law regarding the unpaid seller's lien was clearly laid down in *Richardson vs Grace*³ where the facts were as follows —

The appellants Grace were merchants in Australia and sold a quantity of tea to the respondent Richardson. The tea was in the warehouse belonging to the appellants and the delivery orders were given to the respondent. The delivery orders were subsequently endorsed in favour of W & Co by the respondent and a part of the tea was delivered to W & Co. Thereafter W & Co. became insolvent and the appellants refused to deliver the part of the tea sold which was still in their warehouse except on payment of price. It was held that the appellants were entitled to retain the tea in spite of the fact that the tea was remaining with them in the capacity as bailees for the respondent.

¹ Section 48.

² (1884) 8 Bom. 501.

³ (1877) 3 A.C. 390 P.C.

As has been noticed already the seller's lien is an incident of his possession, and hence the seller loses his lien as soon as he gives the buyer possession and his only remedy for the unpaid price in that event is to sue the buyer for the price of the goods and he cannot rely on any rights on the goods superior to those of any other creditor¹.

Termination of lien :

An unpaid seller loses his lien in the following cases :—

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving for himself the right of disposal of the goods. A sells 500 apples to B for Rs 10/- A delivers the apples to a Railway Company for transmission to B. He further makes out the Railway receipt in the name of B as the consignee and sends the receipt to B. Here A does not reserve the right of disposal. Hence he cannot retain the apples lying in the Railway godown if B fails to pay the price subsequently. But if A made out the Railway receipt in his own name he could have retained the apples as the receipt would indicate that he has reserved the right of disposal.

(b) When the buyer or his agent *lawfully* obtains possession of the goods. A sells a car to B for Rs 2,000/- B gets on the car and drives the car to his own garage, before he has paid the price. Here A cannot retain the car as B has taken possession of the car *lawfully*. But suppose B wants to take the car to his own garage. A objects and demands payment of the price before B takes the car home. B pushes A down and drives the car to his own garage. Here A can retain the car as B has taken possession of the car *unlawfully*, i.e., by using force.

(c) When the seller agrees with the buyer either expressly or impliedly that he would not exercise his right of lien. Such an agreement amounts to a waiver, i.e., renunciation of the seller's right of lien.

Stoppage in transit :

A. (i) The right of stoppage in transit is a right given to

¹ *Manekji Pestonji vs. Wadilal Salabhai & Co.*, 53 L.A. 92.

the unpaid seller for regaining his possession of goods which he has parted with and which are in course of transmission but which have not reached the hands of the buyer or his agent, in case the buyer becomes insolvent. The principle is stated in Section 50 of the Indian Sale of Goods Act in the following terms :—

Subject to the provision of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods, has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price. It should be noted that insolvency of the buyer does not mean that the buyer should actually be adjudged an insolvent. Insolvency has been defined in Section 2 (8) as follows :

A person is said to be insolvent who has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of insolvency or not. Thus the evidence of general inability to pay debts is enough to constitute insolvency for the exercise of the right of stoppage in transit.

The right of stoppage can be exercised so long as the goods are in transit. Whenever this right is disputed Duration of Transit the point to be decided is whether at the time of the seizure by the vendor, the transit of the goods had or had not determined. The general rule is stated in S 51 of the Sale of Goods Act as follows :

(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee. The transit comes to an end as soon as the buyer or his agent takes delivery from such carrier or bailee. But the taking of delivery must be done as an act of ownership. The mere touching or handling of the goods without an intention to exercise the right of ownership will not terminate the transit. In *James vs. Griffin*¹, the facts were as follows : Goods were consigned to buyer by a ship and the buyer became insolvent. The buyer under pressure from the captain sent his son to take the goods with definite

¹ 2 M. & W. 521.

instructions not to meddle with the goods. The son had the goods landed at the wharf where they were stopped by the sellers. It was held that the taking of the goods by the son was not an act of ownership and the sellers were entitled to stop.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. The law on this point is clearly explained by Baron Parke in *Whitchell v. Anderson*¹ in the following words: "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee takes them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems no doubt that the transit could be at an end. This is a case of actual possession. A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent not for the purpose of expediting them to the place of original destination, pursuant to the contract, but in a new character for the purpose of custody on his account and subject to some new further order to be given to him."

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer. This is a case of constructive delivery to the buyer. For the purpose of determining whether the transit has come to an end it is important to consider, even if the goods are still lying with the carrier or bailee, if the carrier or bailee is holding the goods as the agent of the buyer or not. If the carrier or bailee holds the goods as the agent of the buyer the transit comes to an end. It was said in *Richardson v. Goss*²: "If a consignee be in the habit of, with the consent of

¹ 9 M. & W. at p. 534.

² (1803) 3 B. & P. 119.

the owner, using the warehouse of a carrier, packer, wharfinger, or other person as his own, for instance, by making it the repository of his goods, and disposing of them there, the transit will be considered as at an end when they have arrived at such warehouse."

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer. The decided cases establish the principle that if the seller delivers the goods to the master on board the ship as the agent of the buyer, the transit comes to an end. But if the goods are delivered to the master of the ship chartered by the buyer only as a carrier the transit does not come to an end. In *Statesman v. Lancashire and Yorkshire Ry. Co.*¹ the facts were as follows: The seller delivered the goods on board a ship belonging to the buyers and employed as a general trader. The bills of lading were made out in the name of the buyers. It was held that the transit had come to an end by such delivery and the sellers were precluded from stopping the goods. On the other hand, in *Exparte Rosevear China Clay Co.*² the facts were as follows: The sellers delivered goods on board a ship chartered by the buyers. The destination was not known and no bills of lading were made out. It was held that the transit had not come to an end. The distinction is clear. In the latter case the goods were only delivered to a carrier whereas in the former the goods were given to an agent of the buyer and delivery to the agent is delivery to the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end. In *Bird v. Brown*³ the facts were as follows. A gives notice to a carrier to stop the goods. A had no authority to give such notice, he being neither the seller nor his agent. Subsequently the assignee of the insolvent buyer

¹ L.R. 2 Ch. App. 332.

² 13 Ch.D. 360.

³ 4 Ex. 786.

~~demanded~~ the goods. The carrier refused to deliver the goods and ~~handed~~ them over to A. It was held that the stoppage was ineffective and the transit had come to an end on the wrongful refusal of the carrier to deliver the goods to the buyer's assignee. On the other hand if the right to stop is duly exercised the carrier must comply with it and he will be liable in damage if he wrongfully refuses.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods

Right of Re-sale :

A. (m) The exercise by the unpaid seller of his right of lien or stoppage in transit as explained above does not *ipso facto* terminate the contract of sale. The contract of sale still subsists. The exercise of these rights is only a means to compel the buyer to pay the price which is incidental to the contract of sale. But this does not mean that the unpaid seller has to wait *ad infinitum* to realise the price from the buyer. He can re-sell the goods and put an end to the contract of sale under the following conditions¹

(a) Where the goods are of a perishable nature, the seller cannot gain by just retaining the goods or stopping them in transit, for the goods may perish before long. In such a case, the seller is entitled to re-sell the goods. If the seller suffers loss on re-sale due to a fall of price the buyer must make good the loss. If the seller makes a profit on re-sale he is entitled to keep the profit. Added to this, the seller can sue the buyer for breach of contract.

(b) Where the goods are not of a perishable nature, the seller is entitled to re-sell the goods, provided he gives notice to the buyer of his intention to re-sell, and the buyer fails to pay or tender the price within a reasonable time from the giving of such notice. The seller is also entitled to recover from the buyer any loss occasioned by the re-sale and to keep the profits, if any, on the re-sale. The seller is also entitled to sue the buyer for breach of contract. If, however, the goods are not perishable, or the seller sells non-perishable goods without notice, the seller is not entitled to recover from

the buyer any loss he might suffer on the re-sale, and the profit on the re-sale, if any, will go to the buyer.

(c) Where the seller, at the time of the contract, reserves the right to re-sell in case the buyer defaults to pay the price, the seller can always sell the goods.

Breach of Contract of Sale :-

A contract of sale may be broken either by the buyer or by the seller. The remedies for breach of contracts of sale are similar to the remedies of action upon contract or specific performance which we have studied in connection with breach of contract in general. We may enumerate the following remedies for typical breaches of contracts of sale.

(1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract¹, the seller may sue him for the price of the goods¹.

(2) Where under a contract of sale the property in the goods has not passed to the buyer, but according to the contract the price is to be paid on a certain day irrespective of delivery, the seller can sue the buyer for the price if the buyer refuses or neglects to pay the price on or before the appointed day².

(3) Where the buyer *wrongfully* neglects or refuses to accept delivery and pay for the goods, the seller may sue him for damages for non-acceptance. Mark the word 'wrongfully'. The buyer can refuse to take delivery if the goods are defective or not according to sample or description or if delivery was late or for any other reason which is contrary to the terms of the contract. But the buyer cannot refuse to take delivery if the goods are delivered according to the terms of the contract. If he refuses he is deemed to do so unlawfully and in such a case he is liable to damages for non-acceptance³.

(4) Where the seller *wrongfully* neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. Mark the word 'wrongfully' here also. It means that the seller cannot refuse to deliver the goods unless the

¹ Section 55 (1).

² Section 55 (2).

³ Section 56.

buyer has broken some terms of the contract, *e.g.*, failure to pay the price on an appointed day. If the seller does so, he is deemed to have acted unlawfully and he will be liable to pay damages for non-delivery¹.

(5) Where the seller is ready and willing to deliver the goods and the buyer neglects or refuses to take delivery even after a request from the seller, the buyer is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and custody of the goods.²

(6) In some cases the court may compel the seller to deliver the goods and complete the sale by a decree of specific performance where the seller refuses to deliver the goods to the buyer.³ But the buyer can never be compelled to buy the goods where he refuses to accept delivery. A decree of specific performance will only be granted where ordinary damages for non-delivery will not sufficiently compensate the injury suffered by the buyer. The following illustration will make this clear. A contracts with the Government Supply Department to supply shells for guns. The manufacture of shells requires certain chemicals which is stocked only by B. A contracts with B for the purchase of the chemicals. Later on, B refuses to deliver the chemicals. Here damages for non-delivery will hardly compensate the loss which A will suffer for non-delivery of the chemicals. A wants the chemicals and not money. In such a case, therefore, the court will compel B to deliver the chemicals by a decree of specific performance⁴.

(7) Where there is a breach of warranty by the seller, the buyer may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty⁵.

(8) Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach⁶.

¹ Section 57.

² Section 44.

³ See ante "Law of Contract" for specific performance.

⁴ Section 59.

⁵ See ante "Law of Contract" on anticipatory breach of contract.

CHAPTER III PARTNERSHIP (Indian Partnership Act)

Partnership has been defined by the Indian Partnership Act¹ as the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm', and the name under which their business is carried on is called the 'firm name'. This definition means that to constitute a partnership the following conditions must be satisfied.

- (1) There must be a business.
- (2) There must be more than one man associated with the business. There cannot be, however, more than twenty persons and in the case of a banking firm more than ten persons.
- (3) There must be a contract or agreement between the persons by virtue of which the persons are associated with the business.
- (4) The object of the business must be the earning of profit.
- (5) The business must be carried on by all or by any of them on behalf of all.

We may take a few illustrations to show that if any one of the above conditions is not satisfied, a partnership can not exist.

(a) A, B and C buy a few houses together as joint-owners. They collect the rent and share it between themselves. The relation between A, B and C is not one of partnership, for there is no business with which they are associated. A, B and C are simply co-owners of the houses.

(b) A, B and C jointly start a few stores in Calcutta to sell foodstuffs and clothing to orphans and widows at cost price. As the object of the business of A, B and C is purely philanthropic and not to gain any profit A, B and C will not be deemed partners.

Mode of Determining the existence of Partnership :

To determine whether a group of persons does or does not form a partnership or whether a person is or is not a partner in a firm, we have to consider the real relation between the parties as shown by all relevant facts taken together¹. The Partnership Act lays down the following rules to assist the determination of the existence of partnership.

- (i) Co-ownership :—Partnership should be clearly distinguished from co-ownership. Co-ownership simply connotes the ownership of any particular thing being vested in more than one person whereas partnership always signifies the association of more than one person in a *business* with a common purpose, namely, the sharing of profits, and along with it, of losses. "No one ever suggested that co-owners of a house let to a paying tenant, for example, are partners, either as to the house or as to the rent. Their shares are distinct, independent, and separately alienable. If they used the house as an hotel managed by themselves or their agent for their common profit, they would be partners in the business of hotel keeping"². Thus it has been held that part owners of a ship are not necessarily partners³. But if the owners engage the ship in a commercial venture they constitute themselves as partners⁴.
- (ii) The sharing of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners. This will be illustrated by the case of *Lyon vs. Knowles*⁵. The facts of the case were that the proprietor of a theatre hall let the hall to a man named Dillon. Dillon produced shows, managed the theatre and paid all the expenses. The proprietor of the hall paid for only a few minor expenses. The arrangement between the proprietor and Dillon was

that the proprietor would collect all the box money and appropriate half of it. In the light of these facts the court found that the proprietor of the hall shared no risk incidental to the running of the shows, with Dillon. He simply took half of the box money as payment for the rent of the hall. He did not share net profits but only gross profits and as such was not a partner with Dillon.

(iii) The sharing of profits arising from property by persons holding a joint or common interest in that property, or the sharing of the profits of a business by Partnership Act lays down the following exceptions. It was decided in *Cox v. Hickman*¹ that although a right to participate in profits is a strong test of partnership, and though there may be cases where from such participation alone it will be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties, and not upon that one term of it which provides for the participation in profits². The Partnership Act lays down the following exceptions specifically where the sharing of profits does not constitute a partnership.

(a) Where a lender lends money to persons engaged in business or about to engage in business, and receives payment by instalments out of the profits of the business, the lender shares profits but does not thereby become a partner.

(b) Where a servant or an agent receives remuneration on the basis of profits of a business such servant or agent shares profits but does not thereby become a partner.

(c) Where the widow or child of a deceased partner is given an annuity created by a share of profits, such widow or child shares profits but does not become a partner.

(d) Where the seller of a business shares profits out of the business in consideration of the sale of that business, such seller shares profits, but he does not, thereby, become a partner.

Definition of Partnership :

A partnership is brought into existence by agreement or contract between persons who agree to become partners in a business. This agreement need not be in writing and the terms of partnership may be proved by oral evidence or even inferred from the course of dealing of the parties. But generally, where the business is large, the partnership contract is reduced into writing and very generally the terms are embodied in a deed. This deed is known as the articles of Partnership. The articles generally contain the following particulars :

1. The name of the firm.
2. The nature of the business.
3. The duration of the partnership where such duration is fixed.
4. The management of the business.
5. The keeping of accounts.
6. The authority for signing cheques.
7. The provision as to the death or retirement of a partner.
8. The keeping and examination of accounts.

A partnership and a Joint Hindu Family business :

Sec. 5 of the Partnership Act declares that the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such, are not to be regarded as partners in such business. The points of difference between a partnership and a joint Hindu family business may be set out as follows :—

(1) Partnership can only be created by contract. When several persons agree to join each other in a partnership business a partnership is born. But a joint Hindu family business is not the creation of contract. Persons become members of a joint family business because they are born in a joint family which happens to own a business. Membership in a joint family business is the result of status and not of contract.

(2) The death of a member of ~~joint family~~ i.e., a coparcener, or even of the managing member does not dissolve the business, and the property in the business passes by survivorship to the surviving members like any other form of joint family property. But a partnership is dissolved by the death of any one partner.

unless there is a contract to the contrary contained in the articles for the continuance of the business by the survivors.

(3) A minor member of a joint family business becomes a member from the moment of his birth by virtue of his status. But in a partnership a minor cannot become a partner. He can be admitted only to the benefits of the partnership by agreement between the partners.

(4) A partner is entitled to ask for an account of past profits when he severs his connection from the partnership. But a coparcener cannot ask for an account of past profits when he severs his connection from the family business or when he sues for partition of the family business¹.

(5) The rights and liabilities of the coparceners in that also in respect of the joint family trade or business are governed by Hindu Law. But the rights and liabilities of partner of the Partnership are governed by mutual contract subject to the Indian Partnership Act.

Relations of partners to one another :

As partnership is the creation of contract between partners, the relations of partners to one another may be governed by the terms of the partnership agreement. Thus A, B and C agreeing to form a partnership may agree that A will sign cheques and bills, B will have the right to expel any partner he thinks fit, and C will look after the purchase and sale of the business and so on. But whatever may be the terms of the agreement, or in the absence of any written agreement at all, the following conditions are imposed by law on every such contract.

(1) Utmost good faith. Each partner must observe the utmost fairness and good faith to his fellow partners. That is, partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to one another, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative¹. Thus, even where a partnership agreement provides that a partner may be expelled for breach of certain specified articles, the other partners cannot actually expel a partner according to this clause

¹ *Radhakrishna Chetty vs. Srinivasa Aiyar*, 70 M.L.J. 214, 216.
Section 9.

except in good faith. It has been held that such a clause will not justify the expulsion of a partner where the motive for the expulsion is really to purchase the interest of the expelled partner on unfavourable terms¹

(2) Duty to indemnify for loss caused by fraud Each partner must indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm A, B and C are partners in a business of stockbrokers A buys certain shares from his brother at a ridiculously high price The shares go down in price and the firm suffers loss A must indemnify the firm for the loss—

1. Art from the above two provisions the partners may
2. Their relations in any way they like by contract or agree
3. Themselves But when there is no contract or
4. fixed contract exists but it does not cover all the aspects of
5. The relations between partners the following rules as enacted by
6. The Partnership Act will be deemed to regulate and govern
7. The relations of partners between one another
8. The conduct of the business²

Subject to contract between the partners

(a) Every partner has a right to take part in the conduct or management of the business.

A

(b) every partner is bound to attend diligently to his duties in the conduct of the business ;

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners and every partner shall have the right to express his opinion before the matter is decided but no change may be made in the nature of the business without the consent of all the partners and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm

(2) *Mutual rights and liabilities*³

Subject to contract between the partners—

(a) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;

¹ *Green vs. Howell* (1910) 1 Ch. 479, per Lord Hardcastle M R at P 504, 36 Digest 502, 1679

² Section 10.

³ Section 12.

⁴ Section 13.

(b) the partners are entitled to share equally in act is not earned, and shall contribute equally to the losses sustained by the firm ;

(c) where a partner is entitled to interest on the capital subscribed by him, such interest shall be payable only out of profits. But in the absence of agreement no partner is entitled to any interest on the capital contributed by him¹.

(d) a partner making, for the purposes of the bills of payment or advance beyond the amount of capital he has in the firm, is entitled to interest thereon at the rate of five per cent per annum from the date of the advance. That such an advance is treated not as an increase of capital but as a loan on which interest ought to be paid.

(e) the firm shall indemnify a partner in respect of payment made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business ; and

(ii) in doing such act, in any emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances².

(f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

(3) *Personal profits earned by partners*³.

Subject to contract between the partners :

(a) If a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm. "So where a partner enters into a private agreement with a customer of the firm, in relation to goods dealt in by the firm, beneficial to himself only, he will have to share the profits with his co-partners ; for he is abusing his position for his own selfishness and to the detriment of the joint business⁴."

¹ Lord Lindley on Partnership, 10th Ed. 465.

² A Partner is an agent for the firm and this clause repeats the right of an agent as against the principal. See ante "Law of Contract" under the heading Agency. See also Burdon vs. Baskin—36 Digest 349, 268.

³ Section 19.

⁴ Lindley on Partnership—P. 87. See also Russell vs. Astwick (1889). 1 Q.B. 52.

except in a partner carries on any business of the same nature competing with that of the firm, he shall account for and share to the firm all profits made by him in that business.

(4) *The property of the firm*¹.

(a) Subject to contract between the partners, the property of the firm includes all property and rights and interests in fraud originally brought into the stock of the firm or acquired by the partners in or otherwise, by or for the firm, or for the purposes of the business of the firm, and includes also the property in the business.

(b) Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business².

1. In property acquired with money belonging to the firm
2. Deemed to have been acquired for the firm.

Relations of partners to third parties :

A partner is the agent of the firm for the purposes of the business of the firm. That is why it is sometimes said that the law of partnership is a species of the law of agency. The partners are collectively liable for the acts or defaults of each of them in that each partner is *prima facie* the agent of the firm and of each of his co-partners for the purpose of the business of the partnership. This does not mean, however, that a partner can bind the firm or his co-partners for all acts that he may do on his own behalf. A transaction entered into by one partner on behalf of the firm is binding on the firm and makes every partner liable, provided the following conditions are satisfied :

(a) The transaction is related to the normal business of the firm. If A and B carry on business as partners in a wine shop, a contract signed by A in the firm name to supply books would not be binding on the firm or B unless it is made with the express authority of B, for the supplying of books is not connected with the normal business of a wine shop.

(b) The transaction must be an act for carrying on business

¹ Section 14.

² Section 15.

in the usual way. As we have seen above that where the act is not in any way related to the partnership business, the act of the partner cannot bind the firm. But the difficulty arises when an act, though clearly related to the business, is alleged by the firm as not falling within the express or implied authority of a single partner. It has been decided by the Privy Council in *Bank of Australasia vs Brelliat*¹, that a partner can pledge or sell or buy goods, contract or pay debts, draw, make, sign or indorse bills of exchange on behalf of the firm for carrying on business in the usual way.

(c) The transaction must have been carried out by the partner in the firm name or as a partner, contracting on that basis or in any other manner expressing or implying an intention to bind the firm.

(d) The transaction must be one which the partner has either express or implied authority to execute. If it is an act forbidden by other partners and if the third person with whom the partner enters into the transaction knows of the restriction the act will not bind the firm.

The liability in contract of the partners is a joint and several liability whether the contract is executed by one partner or all of them together. The result is that in case of a breach of contract, the third party injured can sue any one partner, or all the partners jointly, and upon judgment if damages are realised from any one partner, he is always entitled to get rateable contribution from his co-partners.

Partner by holding out :

Any one who by words spoken or written or by conduct represents himself or knowingly permits himself to be represented, to be a partner in a firm, is liable as partner of that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself or allowing himself to be represented as a partner does or does not know that the representation has reached the person so giving

¹ (1847), 6 Mees. 152, at p. 193.

² Section 22.

³ Section 25.

credit. This often occurs when a partner retires but nevertheless allows himself to appear as if he still were a partner.¹

This is the rule of liability which is commonly known as arising out of the principle of "holding out." It rests on the principle of estoppel as laid down by S. 115 of the Indian Evidence Act which is as follows: "When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." It was held in *Mallow, March & Co. vs. Court of Wards*², "where a man holds himself out as a partner, or allows others to do it he is then properly estopped from denying the character that he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel."

It should be noted, however, that where after a partner's death the business is continued in the old firm name, the continued use of that name or the deceased partner's name as a part thereof shall not *of itself* make his legal representative or his estate liable for any act of the firm done after his death. The same may, however, become liable if the legal representative becomes guilty of holding out.

What acts amount to "holding out" depends on the facts and circumstances of every case. Such acts may be either positive or passive. The words "knowingly permits himself to be represented" make it quite clear that conduct in order to amount to "holding out" may be passive. A's name is used as a partner by the firm BC in its business dealings. A comes to know of it but does not take any step to stop the use of his name or to warn the public about it. A's silence in this case will amount to "holding out."

Restrictions on the powers of partners :

We have seen above that subject to contract a partner is entitled to act on behalf of the firm in all matters which are

¹ Section 28.

² (1872) L.R. P.C. at p. 435.

³ Section 25.

connected with the business and which are usual for the carrying on of such business. But in the absence of any agreement or usage or custom of trade to the contrary, the implied authority of partner does not empower him to—

- (a) submit a dispute relating to the business of the firm to arbitration,
- (b) open a banking account on behalf of the firm in his own name,
- (c) compromise or relinquish any claim or portion of a claim⁴ by the firm,
- (d) withdraw a suit or proceeding filed on behalf of the firm,
- (e) admit any liability in a suit or proceeding against the firm,
- (f) acquire immovable property on behalf of the firm,
- (g) transfer immovable property belonging to the firm, and
- (h) enter into partnership on behalf of the firm¹

The reason why a partner is not entitled to do the above acts in the absence of agreement or custom is that a dishonest partner may involve the firm and his co-partners in liability if he is allowed to act alone.

Minor as a partner :

We have seen in course of our study of the law of contract that a minor cannot contract. As partnership can be created by contract alone a minor cannot become a partner in a firm. But with the consent of all the partners for the time being, he may be admitted to the benefits of partnership. Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm. But such minor is not entitled to sue the partners for an account or payment of his share of the property or profits of the firm, except when he severs his connection with the firm. Such minor is not personally liable for the liabilities of the firm but his share in the business is liable for such liabilities.

When a minor can become a partner :

A minor admitted to the benefits of a partnership may, within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, give public notice that he has elected to become or that he has elected not to become a partner in the firm. If he elects to become a partner he will become a partner and if he elects not to become a partner he will cease to be a partner. But if he fails to give such notice, he will become a partner in the firm on the expiry of the said six months. When a minor becomes a partner in the above way :

(a) his rights and liabilities as a minor continue upto the date on which he becomes a partner, but he becomes *personally* liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) His share in the property and profits of the firm after he becomes a partner shall be the share which was given to him by the consent of all the other partners at the time of his admission into the partnership business.

When a minor elects not to become a partner :

(a) his rights and liabilities shall continue to be those of a minor upto the date on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of profits when he severs his connection with the firm¹.

Registration :

Registration does not create a partnership. It is the contract between partners which creates a partnership. Registration is only a concrete and reliable evidence of the existence of a partnership. When a firm is registered, the partners cannot deny the partnership to avoid liability. Thus, it affords protection to persons dealing with the firm. But the Partnership Act does not make registration compulsory. It simply provides that an unregistered firm shall suffer from certain disadvantages which may be mentioned as follows :

¹ Section 30.

(1) An unregistered firm cannot sue any third party to enforce any claim arising out of contract and exceeding the sum of Rs. 100/-.

(2) A partner of an unregistered firm cannot sue his co-partners to enforce his rights as a partner excepting when he sues for the dissolution of the firm or for accounts.

These disadvantages do not, however, attach to a firm whose place of business is outside British India.

Formalities of Registration :

A firm must apply to the Registrar of firms for registration. Each province appoints its own Registrar. The application for registration should be accompanied by the prescribed fee of Rs 3/-¹, and it should contain a statement of the following particulars :

- (a) the firm name,
- (b) the place or principal place of business of the firm,
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the name in full and permanent addresses of the partners, and
- (f) the duration of the firm.

The statement must be signed by all the partners or by their agents specially authorised in this behalf. A firm name must not contain words like Crown, Emperor, Imperial, Royal and so on.

When the Registrar is satisfied that the above provisions have been complied with he shall record an entry of the statement in a register, called the Register of Firms and shall file the statement, and this will amount to registration of the firm. When the name of the firm is changed, or the place of business is changed or any one branch is closed or opened or any new partner is introduced or any old partner retires, all such changes must be notified to the Registrar in a prescribed form and the Registrar will then note the changes in the Register of Firms

Duration of partnership :

Unless a partnership is dissolved in the meantime a partnership will continue for whatever period of time is specified in the agreement, or where the partnership is for carrying out a particular venture, until the completion of that venture. Where no time is specified at all the partnership is said to be a *partnership at will*. In the case of a partnership at will, any partner can dissolve the partnership by giving notice to all the other partners. This notice may be either oral or in writing.

Reconstitution of a firm :

A partnership firm is said to be reconstituted when any of the following changes occurs :

(1) Introduction of a new member : A new partner can only be introduced if the contract of partnership provides for it. Otherwise all the partners must agree to the introduction of the new member. Thus, if an existing partner sells his share in the partnership, the purchaser of his share does not become a partner unless all the other partners agree.

A new partner does not, in the absence of special agreement, become liable for the debts of a firm existing before he became a partner. He is liable only for those debts which have been incurred after he became a partner¹.

(2) Retirement of a partner : A partner may retire (i) if the contract of partnership allows him to, or (ii) if all the other partners consent, or (iii) where it is partnership at will, if he gives notice of his retirement in writing to his co-partners².

(a) A retiring partner does not in the absence of agreement cease to be liable for the debts of a firm incurred while he was a partner,

(b) A retiring partner may still be liable as an apparent member of the firm in respect of all debts incurred, to old customers of the firm, even after his retirement, unless such old customers have had actual notice of his retirement.

(c) As regards new customers, ~~doing business~~ for the first time with the firm after the retirement of the retiring member,

¹ Section 31.

² Section 32.

the retiring member is exonerated from all liability if he gives a public notice of his retirement.

(d) All the three rules may be modified by special agreement between partners or between customers and the partners.

(3) Expulsion of a partner A partner cannot usually be expelled unless the contract of partnership gives power to partners to expel any one of them. But even where such a power is given, such power must be exercised in good faith.

The liability of an expelled member is just the same as that of a retiring partner.¹

(4) Insolvency of a partner A partner ceases to be a partner as soon as he is adjudged an insolvent. But the firm is not dissolved unless all the partners, or all partners but one, are adjudged insolvents. As soon as a partner is adjudged an insolvent his estate is no longer liable for any act of the firm and the firm is also not liable for any act of such insolvent partner. There is no need for either the insolvent partner or the firm to give public notice of the insolvency of the partner.

(5) Death of a partner A partnership is dissolved by the death of a partner unless the contract of partnership provides otherwise. Where the partnership is not dissolved, the estate of the deceased partner is not liable for the debts of the firm incurred after his death. But where the partnership is dissolved the estate of the deceased partner is liable for the acts of the firm done before his death.²

Dissolution of a firm :

Dissolution of a firm means the end of the life of the firm. When a firm is dissolved, it ceases to function as a partnership. A firm is dissolved in the following ways

- (i) When the period fixed by the partnership agreement has expired, except that the partners may without making any fresh agreement continue as a *partnership at will*.
- (ii) On the conclusion of a particular transaction for which

¹ Section 33.

² Sections 34 & 4.

³ Section 35.

the partnership was formed, subject to the same exception as in (i).

- (iii) In the case of a partnership at will, by a notice from any partner asking for dissolution.
- (iv) By the insolvency of all, or all but one partners.
- (v) By the death of any one partner.
- (vi) By the partnership becoming illegal, e.g., on the outbreak of war.
- (vii) The court may dissolve partnership in the following cases¹.
 - (a) If any partner becomes a lunatic or permanently of unsound mind, not only the other partners but also the representatives of the lunatic may bring a suit for dissolution.
 - (b) If a partner becomes permanently incapable of carrying out his part of the partnership contract, e.g., physical incapacity or exile, the court, at the instance of any other partner, may dissolve the partnership.
 - (c) If a partner wilfully and persistently commits breach of the partnership contract, the court may at the instance of any one partner, dissolve the partnership.
 - (d) If a partner becomes guilty of such misconduct as would prejudicially affect the business of the firm, the court may allow a dissolution. The misconduct need not be in course of the business of the firm. It may be connected with matters outside the course of the firm's business. Thus, in *Carmichael vs Evans*², dissolution was granted by the court on one of the partners being convicted of fraud for travelling in a railway carriage without a ticket.
 - (e) At the instance of the other partners, if any partner transfers his interest in the firm to a third party, or allows his interest in the partnership to be charged for his own separate debts.

¹ Section 44.

² (1904) 1 Ch. 486.

- (f) If the business cannot be carried on except at a loss, the court may grant a dissolution.
- (g) If in the opinion of the court it is just and equitable to dissolve the partnership, the court may grant a dissolution.

Effect of Dissolution :

The rights and obligations of partners on dissolution are as follows :—

1. Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution.

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for acts done after the date on which he ceases to be partner.

Public notice may be given by any partner¹.

In Pollock & Mulla's Indian Partnership Act illustrations are given by summarising English cases on this point and it will be worth while reproducing those illustrations here.

(a) A and B, partners in trade, agree to dissolve the partnership and execute a deed for that purpose, declaring the partnership dissolved as from 1st January ; but they do not discontinue the business of the firm or give notice of the dissolution. On 1st February, A indorses a bill, in the partnership name, to C, who is not aware of the dissolution. The firm is liable on the bill².

(b) A bill is drawn on a firm in its usual name of the M. Company, and accepted by an authorised agent. A was formerly a partner in the firm, but not to the knowledge of B, the holder of the bill, and ceased to be so before the date of the bill. B cannot sue A upon the bill³.

(c) A is a partner with other persons in a bank. A dies, and

¹ Section 34.
² Pollock & Mulla's Indian Partnership Act (1887) I. D. & Ch. at p. 388.
³ Pollock & Mulla's Indian Partnership Act (1887) I. D. & Ad. 11.

the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. A's estate is liable to customers of the bank for balances due to them at A's death, so far as they still remain due, and for other partnership liabilities incurred before A's death; but not for any debts contracted or liabilities incurred by the firm after A's death.¹

2. On the dissolution of a firm every partner or his representative is entitled, as against all other partners or their representatives to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.²

This involves amongst others the right to account and to have a receiver appointed of the assets of the firm for the purpose of preserving the assets of the firm until accounting is completed and the assets distributed.

3. After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this proviso does not relieve the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.³

4. If a partner dies and the firm is dissolved any profit, secret or otherwise secured by the surviving partner or the representative of the deceased partner in course of winding up must be thrown into the common fund and share.⁴

5. Where a partner has paid a premium on entering into partnership for a fixed term and the partnership is dissolved before the term, he is entitled to recover his premium unless the dissolution is due to death of one of the partners or to his own mis-

¹ *DePAYNES vs. Noble* (1816) 1 Mer. 329.

² *Brices' case* (1816) 1 Mer. 622.

³ Section 46.

⁴ Section 47. "

⁵ Section 50. "

conduct or is in pursuance of an agreement containing no provision for the return of premium paid.¹

Application of the assets of a firm on dissolution :

In settling accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed²:

(a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :-

- (i) in paying the debts of the firm to third parties,
- (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;
- (iii) in paying to each partner rateably what is due to him on account of capital ; and
- (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.³

CHAPTER IV

COMPANY LAW

Indian Companies Act.

In point of time partnerships preceded Companies. The earliest forms of associations of persons for the purpose of doing business for profit were partnership firms. But with the Industrial Revolution when business became more complicated and far flung and liabilities attaching to business concerns went up by leaps and bounds, it was found that it was not possible to build huge business concerns with a few persons having unlimited liability. To build up a Company like the Tatas would require so many millions of rupees as capital and involve so huge a liability that a partnership of a few persons could not possibly undertake so vast a venture and so big a liability. That is why Companies, with many people subscribing capital and sharing risks and liabilities in a limited way, became a necessity in the modern business world. When many people associate themselves in a Company two things stand out.

(1) The Company becomes a separate legal entity. Unlike a Partnership it becomes a person in the eye of law, separate in existence from the people who are its share-holders.

(2) Unlike a Partnership the people constituting a Company do not become responsible for all the liabilities of the Company unless they agree to be so responsible. They are liable, usually, only up to the amount of their shares or any other amount which they fix up by mutual agreement.

A Company can, therefore, be defined as a separate legal person brought into existence by registration or incorporation under the Indian Companies Act of 1913 as amended by Act XXII of 1936 and Act II of 1938, in pursuance of several people agreeing to form themselves into a Company. A Company is also known as a corporation.

Kinds of Companies :

There are two types of Companies—Private and Public. The main points of difference between the two classes of Companies may be described as follows :—

(1) A Private Company cannot have more than 50 members. But a Public Company can have any number of members.

(2) A Private Company must have in its articles restrictions on the rights of transfer of shares. But a Public Company need not have such restrictions.

(3) A Private Company cannot invite the public to subscribe for any shares or debentures in the Company. But a Public Company suffers from no such restrictions.

(4) A Private Company can be formed by two persons whereas a Public Company cannot be formed except by at least seven persons.

(5) A Private Company is not bound to issue a prospectus¹ or a statement in lieu of prospectus, whereas in the case of a Public Company a prospectus or a statement in lieu of a prospectus must be issued.

(6) A Private Company is not required by the Indian Companies Act to file its balance sheet with the Registrar. It is also not required to hold the statutory meeting and to deliver the statutory report to the Registrar. But a Public Company must do all these things.

(7) A Private Company can commence its business as soon as it is registered or incorporated. But a Public Company cannot commence its business without obtaining a certificate of commencement from the Registrar. The Registrar will grant a certificate of commencement only when the following formalities are complied with:

- (a) When shares amounting to the minimum subscription have been allotted.
- (b) When every director has paid for the shares he has taken.
- (c) When a statutory declaration has been filed with the Registrar that the above conditions have been complied with.

Apart from all the provisions mentioned above or any other express provision contained in the Companies Act, a Private Company must conform to all the provisions enacted in the Com-

¹ For prospectus or a statement in lieu of prospectus see *post*.

panies Act. Thus, Lord Macnaghten said in *Trevor vs. Withworth*¹ "the company was a family company. But if the family company, whatever the expression means, does not limit its trading to the family circle and if it takes the benefit of this Act, it is bound by the Act as much as any other company. It can have no special privilege or immunity."

Partnership and Company :

Partnerships and Companies are both forms of business organisation in which several people are associated for the purpose of carrying on business for profit. But, there are certain fundamental differences between these two types of business organisations which may be enumerated as follows

- (a) A partnership or a *firm* has no separate legal existence apart from the partners. A firm simply means the partners who constitute it. Therefore, partners can contract only between themselves and cannot contract with the firm as such. Let us take an illustration. A, B and C are partners of the firm, Martin & Co. Martin & Co. is not a distinct person in the eye of law. A, B and C can make any contract subject to the Partnership Act, and make any arrangement between themselves. But A or B or C cannot make a contract between himself on the one hand and the firm Martin & Co. on the other, as Martin & Co. is not a separate person.

But a company is a distinct being, a separate legal person. It has an independent existence apart from the shareholders who constitute it. Consequently, any shareholder can make a contract between himself on the one hand and the company on the other, as the company has a separate existence in relation to him. This point was finally decided in *Salomon vs. Salomon*.² The facts of the case were as follows : Salomon had a boot business. Later on he formed a company named Salomon & Co. with only seven members, namely himself, his wife, his daughter and his four sons, and with a capital of

¹ 12 A.C. 419 at 434.

² (1897) A.C. 22.

£40,000. To this newly formed company, he sold his old business for £30,000. The company instead of paying Salomon in cash, gave him 20,000 fully paid £1/- shares and £10,000 in debentures, *i.e.*¹ Salomon lent the company £10,000. Apart from Salomon's 20,000 shares, his wife, daughter, and sons took only one share each. Subsequently the company was wound up. The assets of the company were valued at £6,000 out of which to pay £10,000 due to Salomon and secured by debentures and a further £7,000 due to unsecured creditors. The unsecured creditors claimed that Salomon & Co. was really Salomon himself as he held most of the shares. Therefore, Salomon could not owe to Salomon himself. As such the unsecured creditors should get their £7,000/- first. But the court held that Salomon & Co. was separate from Salomon and therefore, Salomon could recover from the company's assets. "Once a company is incorporated, it must be treated like any other independent person, and the motives of those who promoted it are irrelevant."¹

- (b) A partner cannot transfer his share without the consent of his co-partners. But in a company there is no restriction as regards the transfer of shares.
- (c) Each partner is an implied agent of the partnership for the purposes of the firm's business and he can bind the firm and his other partners by his acts related to the normal business of the firm. But a shareholder of a company is not an agent of the company. A company acts through its directors.
- (d) The liability of each partner for the debts of the firm is unlimited, *i.e.* a creditor of the firm can sue any one partner or all the partners jointly for the realisation of his claim. But the liability of the shareholders in a company is generally limited unless the shareholders choose to form an unlimited liability company.
- (e) Partners may make any agreement between themselves regarding the conduct, management or constitution of the partnership. But the Companies Act does not allow certain arrangements to be made between the share-

¹ Topham's Company Law, 9th ed., p. 6.

holders of a company, e.g. a company cannot buy the shares of the members.

- (f) In a partnership, in the absence of any agreement, each partner is entitled to take part in the management. But in a company, the management is generally carried on by the directors only and a shareholder has not any right to take part in the management of the company simply because of his membership.
- (g) The object of a company can only be altered by a special procedure subject to confirmation by the court. But the object of a partnership can be changed by agreement between all the partners.

Formation of Companies :

Steps in the formation of a Company :

In studying Company Law we should be clear about the different stages which are necessary for the formation of a company. In the *first stage* a few people known as promoters get together to form a company. The function of a promoter is that of "one who undertakes to form a company with reference to a given object and to set it going and who further the necessary steps to accomplish that purpose."¹

In the *second stage* the promoter or promoters, when they decide on forming a company, must fix up five things. (a) *Object or purpose* for which the company is to function. (b) The name of the company. (c) The place where the business of the company is to be carried on. (d) How far each member undertakes to be responsible for the liabilities of the company. (e) The amount of capital necessary for successfully carrying on the business of the company. The promoters incorporate their decision "on these five points in a document called the *Memorandum of Association*. In the *third stage* the promoters have to decide *how* the business of the company is to be carried on. Arrangement has to be made for the appointment of directors who will conduct the business of the company, the division and allotment of shares, meetings of shareholders and all other things necessary for the internal administration of the company. These arrangements are embodied in a document called the *Articles of Association*. In the *fourth stage*

¹ *Twycross v. Grant* (1877), 2 C.P.D. 541.

the promoters have to get the company registered by the Registrar of joint-stock companies after submitting information regarding the Memorandum, the Articles, the names of directors and so on. In the *fifth stage* a private company can commence business as soon as it is registered. But a public company have then to issue a prospectus inviting the public to subscribe for shares. They can commence business only after a few more formalities have been complied with. We shall now discuss each of these stages in detail.

Promoters :

In the case of a public company at least seven persons and in the case of a private company at least two persons are necessary to form a company. We have seen before that the few people who form a company for a given object in the very first stage and set it going are known as promoters.

Memorandum of Association :

This document is the primary constitution, the framework within and inside which the company has to function. It defines the object and limits the power of the company. The shareholders, even if they are unanimous, cannot authorise an act which goes beyond the object or powers granted by the Memorandum.¹ According to the Indian Companies Act, the memorandum must contain the following².

(a) *The name* : The Company may choose any name, provided the following rules are complied with.

- (i) The name must be legibly shown on every place of business and every document issued by the company.
- (ii) The name must not contain, without sanction in writing from the Governor-General in council, words such as Royal, Imperial, Federal, State, etc.
- (iii) The name must not be identical with, or too closely resemble, the name of any other Company or Firm, nor may such a name be chosen as is calculated to mislead the public into confusing it with that of an existing business. In the first case the Registrar may refuse to register the company, and in the second, the person or

¹ Ashbury Railway carriage Co. v. Riche (1875), L.R. 7 H.L.P. 672.

² Section 6.

company who is prejudiced may sue for an injunction restraining the Company from using such a name. In *Societe Panhard et Levassor vs. Panhard Levassor Motor Co. Ltd*¹, a well-known French Company which was not registered in England but whose cars were used in England wanted to have itself registered in England. An English Company registered itself with only seven members and with a name which was likely to mislead the public into confusing it with that of the French Company, for the purpose of preventing the French Company to register itself in England. The French Company sued the English Company and the Court restrained the English Company from using the name.

- (iv) The word 'limited' *must* be used as the last word of the name. If any officer of the Company makes a contract on behalf of the company without the word "limited" he will be held liable on the contract personally and the Company will not be bound by such contract. Thus in *Atkins & Co Ltd vs. Waidler* A, B and C, the directors of the South Shields Salt Water Baths Co Limited accepted bills thus — "Accepted A, B and C, directors of S Shields Salt Water Baths Co". The Court held that A, B and C, were personally liable on the bill as they signed without using the word "Ltd".

If a Company, which has been already registered under a name wants to change its name, it can do so by passing a special resolution to that effect and by obtaining the sanction of the local government for the change. The Company must send a copy of the special resolution with the sanction of the local government to the Registrar so that the Registrar can issue a certificate noting the change.

(b) *Registered office* The memorandum must mention the registered office and the province in which the office is situated so that all communications to the company may be properly addressed.

(c) *Objects* : This clause contains a list of the business and acts which the company has power to transact. Any business may

¹ (1901) 2 Ch. 513.

² (1889), 58 L.J.Q.B. 377.

be included which is not illegal or against public policy, e.g. restraint of trade, and the effect of the enumeration of the objects in this clause is that "the company cannot do anything outside the powers given in the Memorandum—anything so done becomes *ultra vires*¹ and the Memorandum cannot be changed without leave of the court. If an act is done by the directors which is *ultra vires*, it is void. The company cannot make it valid, even if every member assents to it."² In *Ashbury Railway Carriage Co. vs. Riche*³, the memorandum of the company gave the power to make and sell *railway carriages*. The company bought a railway concession which power was not given in the memorandum. It was held that the purchase was bad. "If every shareholder had been in the room and if every shareholder had said, 'that is a contract which we authorise the directors to make,' it would be

The powers contained in the memorandum should not be interpreted strictly. A company has implied powers to do the following acts which are not, or need not be, stated in the objects clause.

- (i) Power to do any act which is *fairly incidental* or necessary to the objects stated in the clause. In *Foster vs. London, Chatham and Dover Railway Co.*⁴, it was held that it was within the implied powers of a Railway Co. to let out arches on which the railway was erected, as being fairly incidental to the powers of the Railway Co. This does not, however, mean power to do other business which can be *conveniently* combined with the company's business. Thus, it was held in *Attorney-General vs. London County Council* (1902) A.C. 165 that the County Council could not run omnibuses to feed the tramways where its Memorandum contained power to run tramways only.
- (ii) Any acts permitted by the Companies Act, e.g. to alter its name or its articles, to reduce its capital, etc.
- (iii) Powers to appoint servants and agents to carry out its business.

¹ i.e. beyond the powers of. ² Topham's Company Law 9th ed., p. 27.

³ (1875), L.R. 7 H.L.P. 672.

⁴ Per Lord Cairns, L.C.

⁵ (1895), 1 Q.B. at p. 711.

(iv) Power to borrow in the case of trading companies.

(d) A clause stating that the liability of members is limited whether by shares or by guarantee. If the liability is limited by shares, no member can be called upon to pay more than the nominal amount of his share or so much thereof as remains unpaid. Where it is fully paid up the member's liability is nil. If the liability is limited by guarantee, each shareholder undertakes to meet the debts of the company upto a specified sum, e.g. Rs. 50/- or Rs. 100/- and so on, irrespective of the amount of shares he takes.

(e) *Capital clause*. This clause states the amount of capital which the company is *authorised* by its memorandum to raise, the number of shares into which it is divided and the value of each share. The company cannot alter this share capital unless it is authorised by its Articles and allowed by the court to do so. That is why it is known as 'Authorised capital'. It is also known as Registered or Nominal capital. (NB—Let us anticipate here a few things which comes after the company is registered or incorporated. The whole of the *authorised capital* is not usually offered to the public for subscription. The portion of this capital which is *actually* offered to the public is known as *Issued capital*. The portion of the issued capital which has been actually taken up by the public and allotted is called the *Subscribed capital*. And the portion of the *subscribed capital* which is actually paid up by those who have taken them is known as the *Paid up capital*. The portion of the *subscribed capital* which remains unpaid is known as the *uncalled capital* which the shareholders can be called upon to pay whenever occasion arises.)

Where capital has been divided into different classes of shares, the rights of the different classes need not be set out in the memorandum. They can be set out in the Articles. But where such rights are set out in the memorandum and no provision is inserted for altering these rights, no alteration can subsequently be made without the consent of the court.

N.B.—The classes of shares which the memorandum may contain are the following —

- (1) *Preference shares*—The holders of these shares enjoy preference over all other shares in respect of participation in the dividend or the assets of the Company in case of winding up or both. They also have a prior claim to dividend at a fixed rate determined by the

memorandum or articles before any dividend is allowed on any other class of shares.

(ii) *Ordinary shares*—The holders of this class are entitled to dividend out of net profits after the payment of dividend on the preference shares.

(iii) *Deferred shares*—The holders of such shares are entitled only after other classes of shares have earned certain rates of dividend as per terms defined in the memorandum or the articles.*

(f) *Association and subscription clauses*: These clauses contain a statement of the desire of persons who signed the memorandum, i.e. the promoters, to be formed into a company and it contains an agreement to take at least one share each. There must be at least seven subscribers in the case of a public company and two in the case of a private company¹. The agreement to take shares contained in this clause is absolute and binding even though the company never commences its business, and it cannot be set aside on the ground of misrepresentation.

Alterations of the Memorandum²:

(1) *The name*: We have seen before how the name of a company may be changed.

(2) *Registered office*: We have also seen before how the registered office of a company may be changed.

(3) *The objects*: The objects of a company can be changed only if the following conditions are complied with:

(a) The alteration must be passed by a special resolution of the company.

(b) Notice must be given to every debenture-holder or other persons affected by the change.

(c) Every creditor who objects must be paid off or his debt must be secured to the satisfaction of the court.

(d) The alteration must be sanctioned by the court upon a petition duly presented. The court will sanction the alteration only if the alteration is necessary to enable the company—

* For a detailed study of different classes of shares see *post*.

¹ Section 5.

² Sections 11 and 12.

- (i) to carry on its business more economically or more efficiently ; or
- (ii) to attain its main purpose by new or improved means ; or
- (iii) to enlarge or change the local area of its operations. Thus, in *Re. Indian Mechanical Gold Extracting Co.*,¹ a company which had power to work certain patents in India only were allowed by court to work eslewhere and the memorandum was changed accordingly ; or
- (iv) to carry on some other business which may be conveniently combined with its own ; thus, in *Re Patent Tyre Co.* a company manufacturing tyres was allowed to change its memorandum so as to enable it to carry on trust and finance business. The new business need not be similar, on the other hand similarity of the new business is not necessarily a ground for sanction, particularly if the new business conflicts with the old. Thus, in *Re Cyclists' Touring Club*,² the club was registered as a Co. with the object of promoting and asserting the use of bicycles and tricycles on the public roads. The Co. proposed to alter its powers by including all tourists including motorists. It was held, as one of the objects of the Co. was to protect cyclists against motorists, the alteration cannot be allowed ; or
- (v) to restrict or abandon any of its objects ; or
- (vi) to sell its undertaking ; or
- (vii) to amalgamate with any other company or body of persons.

But no alteration can be made which increases the liability of any member to contribute to share capital or otherwise to pay money to the company.

(4) *Rights of different classes of shares* : If class rights are set out in the memorandum, no alteration can be made in such

¹ (1891) 3 Ch. 538.

² (1907) 1 Ch. 269.

class rights except on petition to the court, or unless such alteration is provided for in the memorandum.

Articles of Association :

These are internal regulations, which determine the rights of members as such and regulate the transfer of shares, the conduct of meetings, the appointment of directors and other similar matters.

Difference between Articles and Memorandum : The articles of a company regulate the internal management and working of a company. The rights of members as against the company, or the relations between members, or appointment of directors, or the method of voting and such other questions of internal administration are all settled by the articles. But the Memorandum defines the framework within which the articles are to function. It determines the relation between the company and the outside world by defining the powers of the company as to what things it can do and what it cannot do. The articles are subject to the memorandum. If they offend any clause in the memorandum they are void to that extent.¹ The articles can be altered by a special resolution, but the memorandum can be altered only under conditions we have mentioned above.

Registration of Articles :

Unlimited liability companies and companies limited by guarantee *must* register their articles. Limited liability companies *may* register their articles. If they do not register, a set of Articles contained in Table A of the First Schedule of the Indian Companies Act will be deemed to apply to them. Certain regulations contained in Table A are applicable to all companies, e.g. the method of deciding questions at general meetings, depositing proxy forms, business to be managed by directors and so on.²

Alteration of Articles³ :

A company can alter any clause in its articles by a special resolution, provided—

- (a) the altered articles are not illegal, i.e. contrary to any statutory provision,

¹ *Ashbury Railway Coach Co. vs. Riche* (1875), L.R. 7 H.L. 672.

² Section 17.

³ Section 20.

- (b) the alteration does not seek to increase the liability of the shareholders,
- (c) the alteration does not conflict with the memorandum
- (d) the alteration is not a fraud on the minority and is made bonafide and in the interest of the company as a whole. Thus in *Brown vs. British Abrasive Wheel Co.*¹, the majority of the shareholders passed a special resolution altering the articles so as to enable nine-tenths of the shareholders to buy out any other shareholder. It was held that the alteration was void as it was a fraud on the minority. But in some cases the majority can even alter the articles so as to be able to exclude the minority where this is done bonafide for the benefit of the company. Thus, in *Sidebottom vs. Kershaw, Leese & Co.*² the articles were altered in such a way that the directors could require any shareholder who was competing with the company to transfer his shares at their full value. It was held that the alteration was valid as it was for the benefit of the company as a whole.

Registration :

The Memorandum and the Articles (if any) must be signed by at least seven persons in the case of a public company and two persons in the case of a private company, each of whom must subscribe at least one share of the company. Then they have to be filed with the Registrar of Joint-Stock Companies along with the following particulars :

- (a) A list of persons who have agreed to act as directors.
- (b) The written consent of those whose names have been given as directors as per above, that they have so agreed
- (c) A statement as to the address of the Registered Office.
- (d) A contract of directors to take qualifications shares, i.e. the minimum number of shares, which according to the articles a director must take, where they have not subscribed to the memorandum.
- (e) A declaration from an advocate, attorney or pleader that

¹ (1919) 1 Ch. 290.

² (1920) 1 Ch. 154.

the provisions of the Indian Companies Act have been complied with.

The Registrar, after he is satisfied that all the requirements have been complied with and the prescribed fees have been paid, enters the name of the company in the register and issues a certificate of incorporation. The company comes into existence as a legal person from the moment the certificate of incorporation is issued.

Prospectus :

A private company can commence its business immediately after it is incorporated. But a public company has to issue a prospectus inviting the public to subscribe to shares in order to raise the minimum subscription without which it cannot commence business. The Indian Companies Act defines a prospectus as "any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company, but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed." In order to be an offer to the public it must be an offer to any person who chooses to come in and take the share. And, therefore, a private offer to friends does not make the document a prospectus. The prospectus is usually issued immediately after the incorporation of the company. It must be dated and signed by all persons named as directors or their authorised agents.

A copy of the prospectus must be filed with the Registrar before it can be issued in order to prevent the public from being misled or defrauded by the optimistic picture generally portrayed by a prospectus. Section 93 of the Indian Companies Act requires that every prospectus must contain the following facts : (1) The contents of the memorandum with names, descriptions and addresses of signatories, and the number of shares subscribed for by them. (2) The number of founders' shares, if any, and the nature and extent of the interest of the holders in the property and the profits of the company. (3) The number of redeemable preference shares intended to be issued together with the date and proposed method of redemption. (4) The number of shares, (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the

directors (5) The names, description and addresses of the directors, manager, and managing agents together with their remuneration and terms of appointment (6) The minimum subscription required for allotment and the amount of share money payable on application and allotment (7) The number and amount of shares and debentures issued within the two preceding years (8) If any part of the issue is underwritten, the names of the underwriters (9) Names and addresses of vendors of any property purchased or acquired by the company (10) If the property was purchased within two years of the issue of the prospectus the history of all previous transfers of the property, and if the property purchased is a business, the profits and the balance sheet (11) A statement about the preliminary expenses (12) The amount paid to any promoter within the two preceding years and the consideration for any such payment (13) The names and addresses of the auditors (if any) of the Company (14) The dates of and parties to every material contract (15) Particulars regarding the nature and extent of the interests of the directors in the promotion of the Company or in the property proposed to be acquired by the Company (16) The rights of voting and the rights as to capital and dividend attached to each class of shares (17) If the articles impose any restrictions on the rights of members to attend, speak or vote in meetings or to transfer their shares, a statement about such restrictions (18) If a Company issuing prospectus has carried on business before the issue of the auditors' report regarding profits and dividend for three preceding financial years, and a report if the proceeds of the issue of shares are to be applied in the purchase of any business

Statement in lieu of Prospectus :

A Public Company cannot allot shares unless it files with the Registrar either a prospectus or a statement in lieu of prospectus. A company may choose either to issue a prospectus or a statement in lieu of prospectus. A statement in lieu of prospectus must be signed by every person named or proposed as director or by his agent authorised in writing. It must be in a prescribed form and contain almost all the particulars set out above.

Underwriting Underwriting is a contract whereby certain people known as underwriters agree to take up a number of

shares of the company if the issue is not fully subscribed in consideration of the payment of a certain commission. Commission for underwriting must be allowed by the articles and as we have seen before, the prospectus must disclose the rate of the underwriters' commission.

Allotment of Shares :

After the issue of the prospectus, the Company sends application forms, each of which must be attached with a copy of the prospectus, to intending subscribers. In due course these application forms reach the company from those who intend to become shareholders. Then the company proceeds to allotment which means the distribution of shares among the applicants. Such allotment shows that the Company has accepted the offers of the applicants. As the Company is the acceptor in every case, the Company has the right to refuse allotment in particular cases. The applicant whose offer is rejected gets in due course a *letter of regret*. Those to whom shares are allotted are intimated of such allotment by *letters of allotment*. No allotment can, however, be made unless the minimum subscription has been subscribed and the amount due on application, which must not be less than 5% of the nominal value of the shares, has been paid in cash or by cheque which the directors have no reason to suspect¹.

N.B.—Minimum Subscription : It is the minimum amount which, in the opinion of the directors, must be raised by the issue to provide for—

- (a) the purchase price of any property purchased or to be acquired ;
- (b) preliminary expenses ;
- (c) underwriting commissions ;
- (d) repayment of money borrowed for these purposes ;
- (e) working capital.

Commencement of Business :

A Public Company cannot commence business even after the shares have been allotted. In order to be able to commence business, the Company must file with the Registrar a duly verified

¹ Section 101.

declaration of the secretary or one of the directors in a prescribed form to the effect that shares to an amount not less than the minimum subscription have been allotted and that every director has taken and paid the amount due on application and allotment of his share. On this the Registrar grants a *certificate for commencement* which entitles the Company to commence business forthwith.¹

Liability for Statements in Prospectus :²

"A contract to take shares is governed by the same rules as other contracts."² Therefore, for untrue statements in the prospectus, liability is on the company in the first instance under the general law of contract.

If a person who subscribes for shares proves—

- (i) that there is an untrue statement in the prospectus, and
- (ii) that he was induced to take the shares in reliance upon it, then he is entitled to set aside the contract on the ground of *misrepresentation*.³ If he can prove that the mis-statement was deliberately made or made recklessly, he will be entitled not only to avoid the contract but also to damages from the company on the ground of *fraud*.⁴

In order, however, to obtain rescission of the contract he must bring his action as soon as he learns the untruth of the statement and in any event, before the winding up of the company. If after discovering the truth he does some act such as attending a Company meeting or accepting dividend, which shows an intention, or in the language of law, election to keep the shares, he cannot subsequently rescind.

Apart from liability under the general law of contract, a special liability attaches to all persons who were directors of the Company when the prospectus was issued, persons who had authorised the use of their names as directors in the prospectus or as having agreed to become directors, promoters, and all those who had authorised the issue of the prospectus. Under section 100 of

¹ Section 103.

² Topham's Company Law, 10th Ed., p. 49.

³ See *ante* 'Law of Contract.'

⁴ See *ante* 'Law of Contract.'

the Companies Act all such persons become liable to pay compensation to any one who subscribes for shares on the faith of a prospectus for damage sustained by reason of any untrue statement in it.

But any of the above persons may escape this special liability if he succeeds in establishing one of the following six defences :

(1) that he believed the untrue statement to be true from the time of the issue of the prospectus down to the allotment of shares, and that he had reasonable grounds for that belief ; or

(2) in case of a director, that he withdrew his consent to become a director before the prospectus was issued and that in fact it was issued without his knowledge or consent ; or

(3) that the prospectus was issued without his knowledge or consent and that as soon as he became aware of it, he gave public notice of the fact that he had not consented ; or

(4) that although he consented to the issue of the prospectus he withdrew his consent to it before shares were allotted and gave reasonable public notice of that fact and with reason for it ; or

(5) that he made the statement upon the authority of an expert whom he had reasonable grounds for believing to be competent ; or

(6) that the statement was a correct copy of an official document.

Capital :

We have seen before that the total capital of a company is used in four different senses, namely (1) *Nominal* or *Authorised capital* (2) *Issued capital*, (3) *Subscribed capital* and (4) *Paid-up capital*. Sometimes the phrase "debenture capital" is used to denote the amount borrowed by the company and secured by debentures. But the capital of a company should not mean borrowed capital.

We have seen before that the capital of a Company is generally divided into—

(1) Preference shares ;

(2) Ordinary shares ;

(3) Deferred shares.

It may be provided either in the memorandum or in the articles. But it is more convenient to provide for power to divide capital into different classes with special rights in the articles,

as the articles can be changed by only a special resolution, without leave of the court. But if the different classes and their rights are fixed by the memorandum, they cannot be altered without the sanction of the court, unless the memorandum itself provides that they may be altered in some particular manner.

Let us now study the different classes of shares :

(1) **Preference Shares :**

The holder of these shares is usually entitled to a fixed rate of dividend, say, five per cent. before any dividend is paid on the ordinary shares. But in such a case, unless the articles expressly provide, he cannot get more than five per cent., however prosperous the company might become.

Cumulative and Non-cumulative :

Preference shares may be either *cumulative* or *non-cumulative*. In case of cumulative preferential shares, if the company is not able to pay the fixed dividend in any year owing to profits being insufficient, the deficiency is made up out of the profits of the subsequent years. Preferential shares are always deemed to be cumulative unless they are made non-cumulative by express provision or by any language which is sufficiently clear, e.g. if the articles provide that preference shares shall be entitled *out of the net profits of each year* to a preference dividend of, say, ten per cent¹. In the case of non-cumulative preference shares, if dividend is not paid in any one year, the deficiency cannot be carried forward as a charge on the profits of the succeeding years.

Preference shares can also be either—(i) *Preferential as to capital*, or (ii) *Non-preferential as to capital*. Where they are made *preferential as to capital*, on the dissolution or winding up of the company, if any surplus assets of the company is left after meeting all the debts, it must be applied first in paying off the holders of these shares. But where they are *non-preferential*, their holders are paid off equally with the holders of ordinary shares.

Redeemable Preference Shares :

Generally a company cannot pay back the capital subscribed by shareholders without the sanction of the court. But by

¹ *Staples v. Eastman Photo Co.* (1896) 2 Ch. 303.

Sec. 105 (B) of the Companies Act a company can, if the articles so provide, issue preference shares on condition that they may be redeemed out of a "capital redemption reserve fund," created out of profits for this purpose or out of the proceeds of a fresh issue of shares or out of the sale proceeds of any property of the company.

(2) Ordinary Shares :

The holder of these shares is entitled to dividend out of the net profits of the company after the fixed dividend on preference shares has been paid up.

(3) Deferred Shares or Founders' Shares :

The holder of these shares is usually entitled to share profits after the dividend on ordinary shares amounts to more than a fixed amount, e.g. the deferred shares may be entitled to half of the profits after a dividend of eight per cent, has been paid on the ordinary shares.

Reserve Capital—When shareholders subscribe to shares they are usually required to pay only a portion of the full value of their shares, e.g. A subscribes to twenty Rs. 10/- shares in the India Steel Corporation. He will not have to pay Rs. 200/- straight way. He will probably be required to pay only Rs. 5/- on each share, i.e. Rs. 100/- in all. The portion of the subscribed capital which is not paid up is known as 'uncalled capital.' When a company by a special resolution declares that this uncalled capital shall not be capable of being called up except in the event of and for the purpose of the company being wound up, this uncalled capital becomes the *Reserve Capital* of the company. It cannot be called in except on winding up.

Stock :

When shares are fully paid up they may be turned into *stock*. When the capital of a company is consolidated into stocks, it is no longer divided into equal parts or shares, but it may be divided into any amounts. Thus, it would be possible to hold Rs. 5/8/- of stock where the shares originally were of Rs. 100/- each. The chief points of difference between stocks and shares may be enumerated as follows—

- (a) Shares may be fully or partly paid up. But stocks must be fully paid up.

(b) Shares can be issued and transferred only in terms of complete and indivisible units of the capital, e.g., a capital of Rs. 1,000 can be divided only into 1,000 Re. 1/- shares or 200 Rs. 5/- shares, or 100 Rs. 10/- shares, and so on. And a share cannot be bought and sold in fractions. If it is of Rs. 5, half of it cannot be sold for Rs. 2.5. But stocks may be issued and transferred in terms of any amount.

(c) Shares are distinctively numbered. But stocks bear no such numbers.

Capital of a company may be altered in the following ways:

- (1) By increasing the Authorised capital of the company.
- (2) By diminishing the Authorised capital of the company.
- (3) By consolidating existing shares.
- (4) By subdividing existing shares.
- (5) By reorganising existing classes of shares.

Let us study each of these.

Increase of Capital :

Every company, if authorised by its articles, subject however to any conditions in the articles, may increase its *nominal* or *authorised* capital by a resolution of the company in a general meeting. If, however, the articles of the company do not authorise such an increase, the company may alter its articles by a special resolution to enable itself to do so. The new capital may be divided into preference, ordinary or deferred shares, provided it is not contrary to the memorandum. If it is, the memorandum may be altered by sanction of the court.

Reduction or Diminution of Capital :

A company may reduce its share capital by a special resolution, provided it is authorised by the articles, subject to confirmation by the court. Reduction is mainly effected in the following three ways:

- (a) Return of paid up capital to the shareholders on the ground that it is not required for the company's purposes.
- (b) Reduction or extinction of the liability outstanding on shares on similar grounds.
- (c) Writing down of the paid up capital on the ground that

assets have been lost and that the capital is not now fully represented by assets¹.

If the existing creditors of the company are not affected by a reduction of capital, e.g. if it is case (c) above and not case (a) or (b), the court will sanction the reduction and confirm the special resolution. But if the reduction does affect the rights of the creditors, e.g. where reduction is effected as in (a) or (b) above, creditors settled by the court must be given notice of such reduction. If any creditor objects to such reduction, his debt must either be satisfied or secured. When the court is satisfied that all the creditors have either consented to such reduction or their claims have been satisfied or secured, the court will sanction the reduction and confirm the special resolution.

Consolidation :

Shares may be consolidated by a resolution of the company in the general meeting, e.g., every ten Re. 1/- share may be turned into Rs. 10/- shares.

Sub-Division :

Shares may be sub-divided, e.g. every Rs. 10/- share may be turned into ten Re. 1/- shares by a resolution of the company in the general meeting.

Re-organisation :

Capital of a company may be altered by re-organisation, i.e. by altering the rights of the holders of different classes of shares. This can be done in the following ways :—

- (a) If the re-organisation is contrary to the memorandum, the re-organisation can be effected by altering the memorandum which can only be done with the sanction of the court.
- (b) if the re-organisation does not require any alteration of the memorandum, i.e. where the rights of the different classes of shareholders are contained in the articles, it can be effected by changing the articles by a special resolution.

¹ Section 55.

Members and Shareholders :

The members of a company are those persons who collectively constitute the company. It has been made clear in *South London Fish Market Co¹* that a member is not necessarily a shareholder as an unlimited company or a company limited by guarantee may exist either with or without a share capital. But where the company is limited by shares, the terms member and shareholder are synonymous. Membership in a company is constituted in the following manner —

(1) The subscribers of a memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

(3) Any person to whom a member transfers his shares in the transfer being recognised by the Directors, his name is put on the register.

(4) The heir or legal representative of a deceased shareholder also becomes a member on his name being substituted on the register.

Cessation of Membership :

Membership is terminated in any of the following manners

- (1) Transfer by a shareholder of his share
- (2) Forfeiture of share for non-payment of calls or otherwise
- (3) Surrender of share
- (4) Death of a shareholder
- (5) By the rectification of the share register and the expunging of the name of a person who has been induced to take shares by fraud and misrepresentation

Transfer of Shares :

A shareholder has a power to transfer his share under Section 28(1) of the Indian Companies Act, which runs thus :
‘The shares and other interests of any member in a company shall

¹ (1888) 39 Ch D 324 C.A.

be movable property, transferable in manner provided by the Articles of the Company.' Thus a shareholder has a right to dispose of his shares subject only to restrictions imposed by the Articles. The most common form of such restrictions is the requirement of the prior sanction of the Directors for a proposed transfer. Where the articles provide that the sanction of the Board of Directors will be required for effecting a transfer, but they would not be bound to assign any reason for withholding the sanction, the transferee's title will not be complete without the sanction.

A person who executes a transfer form does not cease to be a shareholder thereby. He remains liable on his shares until his transferee's name is put on the register.

Transfer how effected :

The transfer must be in writing and the company must not register a transfer unless a proper instrument in writing has been delivered. A transfer need not be by deed, unless the articles expressly require a deed.

A transfer is usually in the following form :

I, A B, in consideration of the sum of Rs. _____ paid to me by C D of _____ (hereinafter called the said transferee) do hereby transfer to the said transferee the share (or shares) No. _____ in the undertaking of the Company Ltd., to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid. As witness hereof our hands the _____ day of _____

Witness to the signatures of etc.

The instrument of transfer is executed by the transferor and handed to the transferee with the share certificate. The transferee executes it, and sends it to the company for registration. Until registration the transfer is not complete.

Transmission of Shares :

Transmission of shares differs from transfer in that it signifies passing of shares from one person to another by the operation of law, such as by death or insolvency. On the death

of a shareholder his share vests in his personal representatives and his estate remains liable for calls. On the insolvency of a shareholder, the Official Assignee or the Receiver can sell and transfer his shares.

Rights of Members :

A member or a shareholder of a public company has the following rights :—

(1) He has a right to transfer his share subject only to the restrictions imposed by the articles¹

(2) He has the right to inspect the register of members kept open in the registered office of the company, gratis²

(3) He can require a copy of the register, or of any part thereof, or the list and summary required by the Companies Act or any part thereof, on payment of 6/- for every hundred words or fractional part thereof required to be copied (S. 36)

(4) He can demand inspection of the minute book of general meetings of the company, register of directors, managers and managing agents, register of contracts in which any director or directors are directly or indirectly concerned, or interested, and also copies of mortgage or charges requiring registration under Section 109 of the Companies Act at all reasonable times (Ss. 83, 87, 91A, 121, 125)

(5) He is entitled to have a copy of the statutory report at least 21 days before the statutory meeting, a copy of the Balance sheet, profit and loss account, auditor's report and the directors' report at least 14 days before the date of the annual general meeting and also of notice of meetings of the company at least 14 days before such meetings (S. 131)

(6) He is entitled to receive a copy of the memorandum and articles within 14 days of his request and on payment of Re. 1/- or such less sum as the company may prescribe (S. 25).

(7) He is entitled to be furnished with a copy of the minutes of general meetings within 7 days after he has made a request in that behalf at a charge not exceeding 2/6/- for every hundred words (S. 83).

¹ Section 28

² Section 36.

(8) He can require a copy of the register of holders of debentures or any part thereof, and also copies of mortgages and charges and the company's register of mortgages on payment of -/6/- for every one hundred words required to be copied. (Ss. 124, 125).

(9) He is entitled to be furnished with copies of the Balance Sheets and the Profit & Loss accounts or the income and expenditure account and the auditor's report at a charge not exceeding /6/- for every hundred words. (S. 135).

(10) He has a right to apply to the Court for rectification of the share register if (a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company, or (b) unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member.

(11) He can apply to the Court to call or direct the calling of a general meeting of the company if default is made in holding a meeting in accordance with the provisions of the Companies Act.

(12) He can apply for compulsory winding up of the company on the ground of default in filing the statutory report.

The members in a body are collectively endowed with certain rights. Under the Indian Companies Act they can collectively do any one of the following acts by ordinary resolution and by a simple majority of votes.

1. Increase the share capital by the issue of new shares if the articles authorise the same.

2. Consolidate and divide all or any of its share capital into shares of larger amounts or sub-divide the shares into shares of smaller amounts. (S. 50).

3. Convert shares into stock or stock into shares. (S. 50).

4. Cancel the shares which have not been taken or agreed to be taken by any person. (S. 50).

5. Discuss and pass any resolution relating to the statutory report in the statutory meeting. (S. 77).

6. Appoint the Directors. (S. 83 B.).

7. Declare dividend, but no dividends declared shall exceed the amount recommended by the directors. (R. 95).

8. Consent to the Directors' selling or disposing of the undertaking of the Company or remitting any debt due by a director (S. 86H.).

9. Appoint auditors. (S. 144).

10. Pass a resolution for winding up of the company when the period, if any, fixed for the duration of the company by the articles expires. (S. 203).

The members or shareholders can by special resolution do the following.

1. Alter the articles. (S. 20)

2. Alter the memorandum, subject, of course, to the sanction of the court. (S. 11 & 12).

3. Reorganise the share capital either by reducing or increasing the same. (S. 54 & 55).

4. Appoint inspectors for investigating the affairs of the company. (S. 142).

5. Wind up the company [S. 203(2)]

The members or shareholders can, by extraordinary resolution, do the following —

1. Declare that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up [S. 203(3)].

2. Remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation before the expiration of his period of office and may appoint another person in his stead (S. 96G).

Duties and Liabilities of Members :

The duties and liabilities of members are partly contractual and partly statutory. The statutory liabilities are those which the Companies Act imposes by virtue of the shareholders becoming shareholders. Thus each shareholder is under a statutory liability to pay the uncalled portion of the money due on shares. Contractual liability is imposed by the articles which every shareholder is deemed to have adopted. We may consider the more important liabilities of shareholders as follows —

(1) Call :

A shareholder is liable only to the extent of the amount unpaid on his shares. Most frequently shares are issued to the public stipulating payment by instalments, e.g. a share of Rs. 100/- is issued, payable as to Rs. 10/- on application, Rs. 20/- on allotment, another Rs. 20/- in a month's time and the remaining

Rs. 50/- when called for. If the company wants the whole or part of the remaining Rs. 50/-, the directors make a "Call." As has already been observed, each shareholder is under a statutory liability to pay the uncalled portion when called upon. It must be noted that the call must be made strictly according to the manner specified in the articles. Otherwise the call is invalid¹. The call is usually made by the directors by a resolution at a Board meeting and the Secretary gives notice of the call to all the shareholders. If a call is invalid, the shareholders need not pay. It should be remembered that mere trifling irregularities will not vitiate a call and the articles of a company may stipulate that a call will be valid in spite of all irregularities².

The power to make a call is in the nature of a trust, and the Directors must exercise the right only for the benefit of the company. If a call is made not for the benefit of the company, the call may be restrained by an injunction. Thus in *Alexander vs. Automatic Telephone Co.*,³ the directors did not make call on their own shares, but made a call on the other shareholders. It was held that the directors must pay the unpaid call money on their shares. On the same principle a call must be made uniformly and a call made on some members only is invalid⁴.

(2) Forfeiture :

Forfeiture is a right of the directors to declare the shares of any member to be forfeited, under a specific power granted by the articles. The articles of a company usually provide that the share of a member may be forfeited in case the shareholder fails to pay on call. It is wrongly believed from the decision in *Hopkinson vs. Mortimer, Harley & Co.*,⁵ that shares cannot be forfeited except for non-payment of calls, since every forfeiture means reduction of capital, which a company cannot do except with the sanction of the court. Forfeiture for non-payment of call only is an exception and sanctioned by the Companies Act. It has been pointed out by Das J. in the unreported judgment in *Narsh Chandra Sanyal vs. Calcutta Stock Exchange* that forfei-

¹ *Re Cawley & Co.* (1889), 42 Ch.D. 209.

² *Dawson vs. African Consolidated Co.* (1898), 1 Ch. 6.

³ (1900) 2 Ch. 56.

⁴ *Galloway vs. Halle Concerts Society* (1915), 2 Ch. 233.

⁵ (1917) 1 Ch. 646.

publications of the company in British India and affixed on every place where it carries on business.

The section also contains a penalty clause for the company and every officer or agent of the company for default in complying with any of the above requirements.

A fee of five rupees or such smaller amount as may be prescribed has to be paid to the Registrar for registering any document required by this section to be filed with him.

The Amendment Act, 1936, adds some more provisions to those already mentioned in regard to foreign companies. They are in the nature of restrictions on their powers of management. Sections 277A to 277E contain these provisions.

Restriction on sale and offer for sale of shares

S. 277A prescribes a restriction on sale and offer for sale of shares in a foreign company. It declares illegal for any person to issue, circulate, or distribute in British India any prospectus offering for subscription shares in or debentures of a foreign company, incorporated or to be incorporated, irrespective of whether it has or has not established, or will or will not establish a place of business in British India, unless (i) a copy thereof, certified by the chairman and two other directors of the company as having been approved by a resolution of the managing body, has been previously delivered to the Registrar for registration, (ii) the prospectus states on the face of it that it has been so delivered, and (iii) the prospectus is dated. It similarly declares illegal for any person to issue to any one in British India a form of application for shares in or debentures of such a company or intended company unless the form is issued with the prospectus. These provisions, however, do not apply to a prospectus or form of application issued to the existing members or debenture-holders of such company. Otherwise, they shall apply whether the prospectus or form of application be issued on or after the formation of the company. A prospectus under this section also includes the document which by virtue of the new s. 98A is to be deemed a prospectus. In fact, the expressions 'prospectus', 'shares' and 'debentures' in this and the next section have the same meanings as when used in relation to a company under the Act.

If a person contravenes any of these provisions, the section also provides a penalty of fine to the extent of Rs. 5,000.

Requirements as to prospectus

S. 277B requires specific particulars to be mentioned in the prospectus to be issued by an existing or intended foreign company in British India. They are with respect to—(i) the objects of the company; (ii) the instrument constituting or defining the constitution of the company; (iii) the law under which it was incorporated; (iv) the place where the said instrument, enactment or copies thereof can

be inspected; (v) the date and the country of incorporation; and (vi) whether there is a place of business in British India and, if so, the address of its principal office.

The provisions of cls. (i) to (iii) shall not apply where the prospectus is issued two years after the company became entitled to commence business.

It will be noted that these particulars are in addition to those required to be specified in a prospectus to be issued by any company incorporated under the Act. Further, the liability for non-compliance with or contravention of any of these provisions is the same as under s. 97 and s. 93 (5).

Restriction on canvassing for sale of shares

S. 277C declares it illegal for any person to go from house to house offering shares of a foreign company for subscription or purchase to the public or any member of the public. 'House' here does not mean an office for business purposes. Any person who contravenes this provision would be liable to a fine to the extent of Rs. 100.

Registration of charges, etc.

S. 277D, which is renumbered as sub-sec. (1) by the Amendment Act II of 1938 along with two provisos inserted by it, provides for the application of ss. 109 to 117, and 120 to 125 to charges on properties in British India created and to charges on property in British India which is acquired after the commencement of the Amendment Act, 1936, by a foreign company having an established place of business in British India. Sub-sec. (2) after over a year of the enactment of this section provides that the latter [now sub-sec. (1)] shall not be deemed to come into force until the commencement of the Amendment Act II of 1938 which introduced this sub-section itself.

Similarly, the last section 277E to which also a proviso is added by the above Amendment Act provides for the application of ss. 118 and 119 of the Act regarding notice of appointment of a receiver and the account to be filed by receiver to all foreign companies having an established place of business in British India. The same section also makes s. 130 of the Act applicable to such companies to the extent of requiring them to keep at their principal place of business in British India the books of account with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to their business in British India.

JOINT STOCK AND OTHER COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT

Sections 253 to 269 enumerate the companies other than those formed in pursuance of the Act which are authorized to register

under the Act and provide rules for such registration and the effect thereof.

(i) Any company consisting of seven or more members existing on the 1st of May, 1882, including any company registered under Act XIX of 1857, and Act VII of 1860 or either of them, and (ii) any company formed after the aforesaid date in pursuance of any Act of Parliament (or Indian law other than this Act), or of Letters Patent or being otherwise duly constituted according to law and consisting of seven or more members, may register itself under this Act as one of the three kinds of companies contemplated by it. But (a) a company falling under any of the classes mentioned in (ii) which is already limited and not being a Joint Stock Company shall not register under this Act; (b) a similar company shall not register as an unlimited company or company limited by guarantee; (c) a company which is not a Joint Stock company shall not register as one limited by shares; (d) a company whose liability is not limited by Act of Parliament or Indian law or by Letters Patent may register as a limited company under the section with the assent of a majority of not less than three-fourths of the members present in person or by proxy at the general meeting summoned for the purpose, (e) a company entitled to be registered under the section shall not register without the assent of a simple majority of members present as aforesaid; and (f) where a company is about to register as one limited by guarantee, the aforesaid assent must be accompanied by a resolution that each member undertakes to contribute to the assets of the company as a present or past member such amount as may be required not exceeding a specified amount for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves. In computing the majority under clauses (d) and (e) above, when a poll is demanded, every vote to which a member is entitled according to the articles shall be counted. A company registered under the Act of 1882 shall not be registered in pursuance of the above provisions. (S. 253).

Modes of registration

A "Joint Stock" company means a company having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock and no other persons, and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares. (S. 254.) Following documents should be delivered to the Registrar before such a com-

pany could be registered: (1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not more than six clear days before the day of registration, were members of the company, with the addition of shares or stock held by them respectively, distinguishing, where shares are numbered, each share by its number; (2) a copy of an Act of Parliament, or Indian law, Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and (3) if the company is intended to be registered as a limited company, a statement specifying (a) the nominal share capital and the number of shares into which it is divided or the amount of stock of which it consists; (b) the number of shares taken and the amount paid on each share; (c) the name of the company with the addition of the word "Limited," as the last word thereof; and (d) in the case of a company intended to be registered as one limited by guarantee, the resolution declaring the amount of the guarantee. (S 255).

Following documents should be delivered to the Registrar before any company other than a Joint Stock Company could be registered in pursuance of s. 253 stated above:—(1) a list of the names, addresses and occupations of the directors; and (2) a copy of any Act of Parliament . or other instrument constituting or regulating the company. In the case of a company of this kind intended to be registered as one limited by guarantee; a copy of the resolution declaring the amount of the guarantee should also be filed. (S. 256).

Section 257 requires that every one of the documents which are required to be filed as above should be duly verified by two or more directors or other principal officers of the company. The Registrar may call for evidence to show that the company proposing to be registered is a Joint Stock company as defined above. (S. 258). On compliance with these requirements and payment of necessary fees which shall not be chargeable to a company which is not to be registered as a limited company, or whose liability is limited, before its registration as a limited company, by some Act of Parliament or Indian law or by Letters Patent, the Registrar issues a certificate of incorporation whereupon the company becomes entitled to have perpetual succession and a common seal. (Ss. 260 and 262).

But such certificate cannot have any effect in the case of a banking company existing on the 1st of May, 1882, and registered with limited liability under these provisions as against a person having an account with the bank, if the company omits to give at least 30 days' notice to him of its intention to register as a limited company under the Act. (S. 259).

Effect of registration

On registration, all property of every kind and all interests and rights in, to and out of such properties including obligations and

actionable claims belonging to the company at the date of the registration under the aforesaid provisions pass to and vest in the company as incorporated (s. 263). But the registration shall not affect the rights and liabilities of the company in respect of any debt or obligation incurred or contract entered into by, to, with or on behalf of, the company before registration (s. 264). Similarly, all proceedings of a legal nature pending by or against the company, or the public officer or any member thereof, at the time of registration may be continued as if no registration had taken place. But any decree or order obtained in consequence of such proceedings shall not be executed against any individual member of the company; however, in the event of the property and effects of the company being found insufficient to satisfy the decree or order, an order may be obtained for winding up of the company. (S. 265).

Other effects of registration of a company under the aforesaid provisions are stated in section 266. They are (1) all provisions contained in any Act of Parliament . . . or other instrument constituting or regulating the company including, in the case of a company registered as one limited by guarantee, the resolution declaring the amount of guarantee, are to be deemed as conditions and regulations of the company in the same manner and with the same incidents as if the company was formed under the Act, and such provisions were included in its memorandum and articles; (2) all the provisions of the Act apply to such company subject as follows. (a) Table "A" will not apply unless adopted by a special resolution, (b) provisions as to the numbering of shares will not apply to any Joint Stock company whose shares are not numbered; (c) the provisions contained in any Act of Parliament or Indian law cannot be altered, but those in the Letters Patent may be altered with the sanction of the Central Government; (d) but provisions in a Royal Charter or Letters Patent cannot be altered with respect to the objects of the company; (e) in the event of the company being wound up, every person who is liable for debts and liabilities contracted before registration shall be a contributory in respect of such debts and liabilities, and as such, he shall be liable to contribute, in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of the Act with respect to the heirs and legal representatives of deceased contributories and with reference to the assigns of insolvent contributories shall apply; (3) the provisions of the Act as to (a) the registration of an unlimited company as limited; (b) the power of such company on being registered as limited to increase its nominal share capital and to provide for a reserve capital; and (c) the power of a limited company to set aside a certain portion of its capital as a reserve capital, apply notwithstanding any provisions contained in any Act of Parliament. . . .

or other instrument constituting or regulating the company; (4) provisions contained in any deed of settlement, contract of co-partnership, Letters Patent or other instrument constituting or regulating the company as would, if the company had originally been formed under the Act, have been required to be contained in the memorandum and are not authorized to be altered under the Act cannot be altered; and (5) nothing in this section shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament... or other instrument constituting or regulating the company, be vested in the company.

A company registered under the aforesaid provisions may by special resolution alter its constitution by substituting a memorandum and articles for a deed of settlement which includes any contract of co-partnership or other instrument regulating or constituting the company, not being an Act of Parliament or Indian law, a Royal Charter or Letters Patent. Where such alteration is made, it has to be confirmed by the Court, and a printed copy of the substituted memorandum and articles should be filed with the Registrar. An alteration of the above nature may also be accompanied by an alteration of the company made in pursuance of the provisions under the Act (S. 267).

Finally, the Court may stay or restrain, besides the proceedings against the company, proceedings against a contributory on an application by a creditor after the presentation of a winding-up petition and before a winding-up order is made. After such order, no suit or proceedings can be commenced or proceeded with against the company or any contributory in respect of any debt of the company except by leave of the Court, and subject to such terms as the Court may impose (Ss. 268 and 269).

REGISTRATION OF UNLIMITED COMPANY AS LIMITED

A company registered as unlimited may register under this Act as limited, or any company already registered as a limited company may re-register under this Act, but the registration in case of the former shall not affect the liabilities incurred by the company as an unlimited company prior to its registration. The effect of registration is to make it a limited company as regards liabilities incurred subsequent to its registration as a limited company. (S. 67). The next section gives power to unlimited companies having a share capital to provide for reserve share capital on registration as a limited company. In pursuance of the power, it can do either of the two following things by its resolution for registration as a limited company:—

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the con-

dition that no part of the increase shall be called up except in the event of the company being wound up; or

(b) provide that specific part of its uncalled share capital shall not be capable of being called up except in the event of the company being wound up.

LECTURE XIV

MODES OF WINDING UP

What is Winding up—Modes of Winding up—Compulsory Winding up—Who may petition—Procedure in Compulsory Winding up—Voluntary Winding up—General Procedure in Voluntary Winding up—Compulsory Winding up pending Voluntary one—Arrangement with creditors—Amalgamation and Reconstruction—Winding up under Supervision of the Court—Effect and Advantages of a Supervision Order.

WHAT IS WINDING UP?

The winding-up or liquidation of a company is a proceeding in which all its affairs are wound up, its rights and liabilities ascertained, and the claims of its creditors paid off out of the assets of the company including the contributions by its members to the extent to which they may be necessary. If any surplus assets are left, they are divided among the members of the company in proportion to their rights under the articles. This being done, the company is dissolved on compliance with the requisite formalities prescribed by the Act.

But a question may be raised whether a company may be wound up or carried into liquidation at any time, or only under the circumstances in which an individual may be adjudged insolvent under the Insolvency Acts

In answer to this question, it must be clearly borne in mind that winding up of a company is not the same thing as the bankruptcy of a company. For the general rule in regard to winding up is that if the members of a company desire that the company should be dissolved or if it becomes insolvent or is otherwise unable to pay its debts, or if for any reason it seems desirable that it should be cease to exist, it is wound up. It will, therefore, be obvious that a company may be wound up even when it is perfectly solvent, e.g., for the purposes of reconstruction. Furthermore, a company can never be declared bankrupt although it is unable to pay its debts. It can only be wound up, though, of course some provisions of Insolvency law are made applicable to companies in liquidation. (See

ss. 169, 171, 195, 196 and 227 to 232 of the Companies Act). We may, therefore, put the position thus, viz., that, in so far as inability to pay debts is concerned a bankruptcy of an individual under the Insolvency law is the same thing as a winding-up of a company under the Company Law but a company can also be wound up for reasons other than mere inability to pay its debts.

MODES OF WINDING UP

Now a company can be wound up either (1) compulsorily by the Court or (2) voluntarily, or (3) under the supervision of the Court.

Section 155 of the Act lays down these three methods of winding up and provides that the provisions of the Act with respect to winding up shall apply, unless the contrary appears, to the winding-up of a company in any of these three modes.

In every winding-up, a Liquidator or Liquidators are appointed to administer the property of the company, and he or they must apply the assets of the company, first, in the payment of the creditors in their proper order and then, in distributing the residue among the members according to their rights.

COMPULSORY WINDING UP BY COURT

A company may be wound up by the Court when (i) it has passed a special resolution to be wound up by the Court; (ii) default is made in filing the statutory report or holding the statutory meeting; or (iii) it does not commence business within a year from its incorporation or suspends business for a year; or (iv) the number of its members falls below seven (in case of a private company, below two); or (v) it is unable to pay its debts; or (vi) the Court is of opinion that it is just and equitable that it should be wound up (s. 162).

(i) A company may be wound up for any cause whatever under this clause if it passes a special resolution to that effect.

For clause (ii), see p. 137 *ante*.

As regards clause (iii), it must be carefully noted that the power of the Court to wind up a company which has not carried on business for a year is discretionary and will not be exercised unless there are indications that the company has no intention of continuing its business. Similarly, if the suspension of its business for a year is well accounted for and appears to be due to temporary or unavoidable causes, the Court will not order a winding-up. In *re Capital Fire Insurance Association*, 24 Ch. D. 408. Further, a company will not be wound up because it has ceased to carry on one of its several businesses unless that business is the main object of the company. *Re Amalgamated Syndicate*, (1897) 2 Ch. 600.

Similarly, a company which has amalgamated with another company cannot be wound up on the ground that it has ceased to carry on business as a separate company. In such a case, the proper course is to move the Registrar to strike the company's name off the register as a defunct company. In *re National Finance Co.*, (1866) W. N. 243.

Under clause (iv), a company is generally wound up voluntarily, and it is not very frequently that the Court orders the winding-up under this clause.

In regard to clause (v), we have to consider when a company should be deemed to be unable to pay its debts. S. 163 of the Act lays down specific instances when the company shall be deemed unable to pay its debts. They are :—

(1) if a creditor by assignment or otherwise to whom the company owes a sum exceeding Rs. 500 then due has served on the company a demand for payment, and the company has for three weeks thereafter neglected to pay it or to secure or compound for it to the reasonable satisfaction of the creditor;

(2) if execution or other process issued on a decree or order of any Court in favour of a creditor is returned by the company unsatisfied in whole or in part;

(3) if it is proved to the satisfaction of the Court that the company cannot pay its debts, and, in determining whether it is unable to pay its debts, the Court shall take into account the contingent or prospective liabilities of the company.

If any of these instances be proved, the company must be compulsorily wound up by the Court. If the debt is disputed, no order for winding-up can be made. But if it is not, the Court may, under (3) above, be satisfied that the Company cannot pay its debts, and order the company to be wound up, however small such debt may be. In such a case, it is neither necessary that a demand should have been made nor execution levied. Thus, in *Re Globe Steel Co.*, 2 Eq. 337, the Company accepted a bill of exchange in part payment for goods bought. No demand had been made or execution levied. The bill was dishonoured. It was held that it was sufficient proof of the company's inability to pay its debts. The Court under this clause has really to see whether the company is "commercially insolvent," which expression has been defined in *re European Life Assurance Society*, L. R. 9 Eq. 122 by Sir James William V. C. to mean:

"Not in any technical sense but plainly and commercially insolvent—that is to say, that its assets are such and its existing liabilities are such, as to make it reasonably certain—as to make the Court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities."

This definition was recently adopted by the Bombay High Court in *Re Cine Industries & Recording Co. Ltd.*, 44 Bom. L. R 387. Further, it should be noted that a creditor having a claim for less than Rs 500 can also move the Court under cl (3). It is only when he wants to proceed under cl (1) that the formalities stated therein should be complied with. Similarly, if it could be clearly shown that the company cannot possibly make profit, a winding-up order would be made although it might have valuable assets. *Re Factage Parisien*, explained, 2 Ch App at pp 745 and 747. The company in this case was carrying on its business at a loss and was paying its debts by making new calls on the members. It was held that the company may be wound up. It was there observed:

If they are carrying on business at a manifest loss and it is totally impossible to make any profits it can scarcely be said that this Court will consider it just and equitable that the company should be allowed to continue when people who have embarked property to a considerable amount in it do not wish it to go on. It is quite distinct from saying that it is an insolvent company or that it cannot pay its debts because the persons managing it will take care to have all the debts paid by making calls to meet them.

Cl (vi) of section 162 is the most general clause under which petitions for compulsory winding up are usually made. The words 'just and equitable' in the clause are not to be construed *eiusdem generis* as it was at one time held. *Sailing-ship "Kentmere,"* (1897) W N 58. They are words of widest significance and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances. In *re Standard Aluminium and Brass Works*, 30 Bom L R 509. The Court, however, will not make the order for winding up unless there is some special reason for so doing, so much so that even general, as distinct from specific, charges of fraud are not usually sufficient for making such order. In fact, the Court will not exercise its jurisdiction under this clause unless some wrong has been done to the company, and the company is deprived of its remedies in respect of it by the improper use of voting power of the shareholders, or the substratum of the company has gone, or it is impossible, owing to the way in which the voting power is held and to the feelings of the directors towards each other, for the business of the company to be carried on. *Anglo-Continental Produce Co.*, In re, (1939) 1 A E R 99. The cases usually coming under this clause are, therefore, cases of deadlock in the management, where the substratum of the company is gone and cases of fraud and of oppression of a minority by the majority. In *re Janbazar Manna Estate Ltd.*, 58 Cal 716. The substratum of a company is deemed to be gone when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, or (d) the existing and possible

assets are insufficient to meet the existing liabilities of the company. *In re Cine Industries & Recording Co. Ltd.*, (*supra*); *Re Baku Consolidated Oilfields, Ltd.*, (1944) 1 A. E. R. 24. In *Murlidhar v. Bengal Steamship Co.*, 47 Cal. 654, the deadlock could not be proved because the company had appointed other managing agents in place of the first ones whose firm was dissolved. In *Re Yenidje Tobacco Co.*, (1916) 2 Ch. 426, the company was ordered to be wound up as the company could not conduct its business by reason of its two directors who were also the only shareholders not being on speaking terms with each other. Where allegations of dishonesty were made by the directors against each other in respect of defalcations of certain of the company's funds, the company was ordered to be wound up on the ground that it was a case in which the conduct of some of the officers of the company required an investigation which could only be obtained in a winding-up by the Court. In *re Varieties, Ltd.*, (1893) 2 Ch. 235; In *re Haycraft Gold etc. Co.*, (1900) 2 Ch. 230. Similarly, where the object of a company is fraudulent, the company may be wound up by the Court. *Re Brinsmead & Sons*, (1897) 1 Ch. 45. But the fact that the managing directors had a preponderating voice in the company by reason of their owning or controlling a large number of shares, or that the dividends had not been paid regularly was of itself no reason for winding up the company. Similarly, the fact that a company is working at a loss is by itself no ground for winding it up especially when not a single shareholder has come forward to support the petition for winding up. *New State of Insurance Co. Ltd. v Superintendent of Insurance*, A. I. R. (1943), Lah. 109. In the case of a private company, the principles to guide the Court in determining whether or not a winding-up order should be made are those which apply to determining whether or not a partnership should be wound up. Accordingly, where a father and two of his sons were the only shareholders of the company and, on the father's death, the latter exercised of their discretion under the articles refused to register the transfer of their father's shares in the name of their three other brothers to whom they were bequeathed by the father, it was no ground for winding up the company. *Cuthbert Cooper & Sons, Ltd.*, In re, (1937) Ch. 392. A lack of confidence in the management of the company's affairs by the directors may, however, justify the winding-up order under this clause. Merely an *ultra vires* transaction on the part of the directors is of itself no ground for a winding up order. *Ripon Press Co. Ltd.*, v. Gopal, 61 M. L. J. 783 (P. C.).

WHO MAY PETITION?

An order for winding up of a company is made by the Court on a petition made to it. S. 166 of the Act enumerates the persons who

can make such petition. They are: (1) the company, (2) any creditor or creditors (including any contingent or prospective creditor or creditors), (3) a contributory or contributories, (4) all or any of those parties, together or separately, and (5) the Registrar. A policy-holder in a life insurance company cannot apply to wind up the company as he is neither a contributory nor a creditor of the company. In *re Aryan Life Assurance Society, Ltd.*, 40 Bom. L. R. 52

Creditor's petition

The Court is usually bound to make an order for winding-up on the petition of a creditor if he can prove that he claims an undisputed debt and that any of the contingencies stated in s. 162 has arisen to justify such order. The order may, however, be refused for special reasons, e.g., where the Court finds that the majority of creditors do not want it. *Re Ilfracombe Building Society*, (1901) 1 Ch. 102, *In re Cine Industries & Recording Co. Ltd.*, (*supra*). Similarly, such order will not be made where it is not likely to do any good.

But the Court is not bound to make the order at once. It may direct the petition to stand over for some time if there is a possibility of the company making proper arrangements to meet its immediate liabilities and setting its business on an improved and sound basis. *Re Brighton Hotel Co.*, 6 Eq. 339.

It has been stated above that if the debt of a petitioning creditor is disputed, no order for winding up can be made. But the Court in such a case may order the petition to stand over until the validity of the debt is determined, or may dismiss the petition, and even restrain the creditor by injunction from bringing a threatened petition. *Niger Merchants' Co. v Capper*, 18 Ch. D. 577n. A creditor whose debt is unliquidated cannot petition for winding up.

A debenture-holder may petition if the principal moneys are payable to him direct and not to the trustees of a debenture trust deed. But the order will be refused where the debenture-holder has power to appoint a receiver, and has not done so. *Re Exmouth Dock Co. Ltd.*, 17 Eq. 181.

Similarly, the assignee of a debt or a part of a debt can petition, but not a creditor of a third party who has by a garnishee order attached a debt due from the company to the third party.

The section also says that a contingent or a prospective creditor can petition, but in the proviso it is laid down that such petition shall not be heard unless security for costs has been given and a *prima facie* case for winding up has been established.

Petition by Contributory.

Unlike the case of a creditor, the Court is not bound to make an order for winding up on a contributory's petition, and it may,

before making such order, consider the wishes of the creditors and other contributories for which purpose it may direct their meetings to be held. The Court will not make the order if the interest of the petitioning contributory is very small, and the majority of members do not wish the order to be made, or if the number of shareholders is very small. But such order would be made if the Court finds that there is something which requires investigation, e.g., the conduct of a director. *Re Varieties Ltd.*, (1893) 2 Ch 235. Similarly, an order for winding up will not be refused even if the company has no assets (s. 170), or because a voluntary winding-up has commenced if the interest of the contributory is prejudiced thereby. A contributory may also petition for winding up if the company makes default in filing the statutory report or holding the statutory meeting. A creditor cannot file such petition. And the petition by a contributory cannot be filed in this case before the expiration of 14 days after the last day on which such meeting ought to have been held.

But a contributory cannot petition unless (a) the number of members has become less than seven (or two in case of a private company), or (b) the shares in respect of which he is a contributory or some of them were originally allotted to him, or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up or have devolved on him through the death of a shareholder [S 166, prov. (1)]

Registrar's petition

The Registrar is also now entitled to present a petition for winding up under the amended s 166 of the Act on the one and only ground that from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under s. 138 it appears that it is unable to pay its debts. But he can present the petition only after getting the sanction of the Central Government which shall not be given unless the company has first been afforded an opportunity of being heard

PROCEDURE IN COMPULSORY WINDING UP

A winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up (s. 168). And the order made on the petition by whomsoever presented operates in favour of all the creditors and contributories of the company as if it was made on the joint petition of a creditor and a contributory (s 167). After the presentation of the petition and before making an order thereon, the Court may, at any time, on the application of the company, a creditor or a contributory, restrain any further proceedings in any suit or proceeding against the company on such terms as it may think fit (s. 169).

On hearing the petition, the Court may either (1) dismiss it with or without costs, or (2) adjourn it conditionally or otherwise, or (3) make any *interim* order or any other order that it deems just.

If the order of winding up is made, the Court may appoint a liquidator simultaneously or forthwith cause intimation thereof to be sent to the official receiver (s. 170). It may also settle the list of contributories, make calls, and determine any question arising in the winding up on the application of the liquidator. Further, after the order is made or a provisional liquidator is appointed, no suit or other legal proceedings shall be commenced or proceeded with against the company except with the leave of, and subject to such terms as may be imposed by, the Court (s. 171).

On the order being made, a copy thereof must be filed within a month with the Registrar by the company and the petitioner whereupon the Registrar notes it down in his books and notifies the fact of the order in the Official Gazette. Such order, again, operates as a notice of discharge to the servants of the company, except where the business of the company is continued (s. 172).

On satisfactory reasons being shown, the Court may also stay the winding up proceedings either altogether or for a limited time (s. 173). And further even after the company has been dissolved by virtue of an order of the Court made after all the affairs of the company are completely wound up under s. 194, the Court may, within two years, on the application of the liquidator or any person interested, make an order declaring the dissolution to have been void. Proceedings can then be taken as if the company had not been dissolved. The person who obtains the order avoiding the dissolution must file a copy thereof with the Registrar within 21 days (s. 243).

Powers of the Court

Several powers have been vested in the Court by the Act to be exercised after an order for winding up is made. It has to settle the list of contributories, rectify the register of members, if necessary, and cause the assets of the company to be collected and applied in discharge of its liabilities. It may require any person for the time being on the list of contributories, any trustee, receiver, banker, agent or officer of the company to pay, deliver, surrender or transfer forthwith or within such time as it may direct to the official liquidator, any money, property or documents in his hands to which the company is *prima facie* entitled, allow any contributory by way of set-off any money due to him or the estate which he represents from the company; make calls and order payment thereof by the contributories by what is called a "balance order" which may include calls made before the winding up and yet would not bar a regular suit in respect thereof; adjust the rights of the contributories among themselves; summon and examine any officer or person who may be

capable of giving information concerning the affairs of the company; order public examination of promoters, directors and any officers of the company on the application of the liquidator that, in his opinion, a fraud has been committed by any one of such persons in relation to the company, (*Sir Fazal Ibrahim Rahimtoola v. A. G. Desai*, 51 Bom L. R. 510) and lastly, cause a contributory absconding or removing any of his property to be arrested and his books, papers and movable property to be seized. These powers are in addition to any existing powers of instituting proceedings against any contributory or debtor of the company or his estate for the recovery of any call or other sums. (Ss. 184-193 and 195-198).

An appeal lies against any order or decision made or given in the matter of winding up of a company by the Court in the same manner and subject to the same conditions in, and subject to, which appeals may be had from any order or decision of the same Court in cases within its original jurisdiction (s. 202). It has been held that only a liquidator, a creditor or a contributory can appeal under this section. *Motilal Kanji & Co. v. N. M. Jhavery*, 33 Bom L. R. 1495.

VOLUNTARY WINDING UP

A voluntary winding up of a company is vastly different from a compulsory winding up thereof. The object of a voluntary winding up is that the company and its creditors shall be left to settle their affairs without going to Court, but they may apply to the Court for any directions or orders if and when necessary.

A voluntary winding-up can be effected (1) when the period (if any) fixed for the duration of the company has come to an end, or an event upon which the company is to be dissolved has occurred, and the company has in general meeting passed an *ordinary resolution* to wind up; or (2) if the company by a *special resolution* resolves that the company be wound up voluntarily for any reason whatever; or (3) when the company has passed an *extraordinary resolution* that it cannot by reason of its liabilities carry on its business, and that it is expedient that the company be wound up. (S. 203).

In the last case, the notice calling the meeting must clearly state that it is proposed to wind-up the company because its liabilities prevent it from carrying on its business. *Silkstone Fall Colliery Co.*, In re, 1 Ch. D. 38. If, in pursuance of a defective notice, an extraordinary resolution for winding-up be passed, the resolution itself will be bad.

It must be noticed that each of these three cases provides a different kind of resolution for the purpose of taking the company into voluntary liquidation. At any rate, notice of the resolution for winding-up (whether extraordinary or special) must be given by

the company within 10 days of the passing thereof by advertisement in the local Official Gazette and also in some newspapers circulating, if at all, in the district where the registered office of the company is situate (s. 206).

A voluntary winding-up commences at the time of the passing of the resolution authorising it (s. 204).

Two classes of voluntary winding-up

Following the English Companies Act, 1929, the Amendment Act, 1936, now divides voluntary winding-up into two classes: (a) shareholders' and (b) creditors', and lays down the procedure to be followed in each case. The case falls under (a) when the company is solvent and is able to pay its debts in full. In this case it is not necessary to consult the creditors or to call their meeting. The directors only make a declaration of solvency stating that, in their opinion, the company will be able to pay up its debts within 3 years from the commencement of the winding-up and then the company and the shareholders proceed to appoint their own liquidator and to wind-up the company. The declaration must be supported by a report of the company's auditors on the company's affairs and delivered to the Registrar before the notices of the meeting at which the resolution for winding-up is to be proposed are sent out. Where, however, the company is not solvent and the directors do not file the declaration about its solvency, the creditors must be called in meeting on the same or next day after the resolution for voluntary winding-up is passed; then the creditors along with the shareholders appoint a liquidator or a committee of inspection and jointly carry out the liquidation. The new provisions bearing on these two classes of voluntary winding-up are embodied in ss. 208 to 218.

(a) Members' voluntary winding-up

Provisions contained in the new ss. 208A to 208E affect a winding up resolved upon by the members of a company.

Firstly, the company in general meeting must appoint one or more liquidators for winding-up the affairs of the company and fix his or their remuneration. On such appointment, all the powers of the directors of the company come to an end except in so far as the company in general meeting, or the liquidator, sanctions the continuance thereof. (S. 208A). These provisions correspond to those contained in cls. (ii) and (iii) of s. 207 of the Act prior to the amendment. In case of a vacancy occurring by death, resignation or otherwise in the office of a liquidator so appointed, the company in general meeting may fill it subject, of course, to any arrangement that may be made with the creditors of the company. The general meeting for the purpose may be convened by any contributory or

the continuing liquidator, if any, (S. 208B identical with s. 210 of the Act before the amendment).

Provisions of ss. 208C to 208E are practically common with those applicable to a creditors' winding-up and, therefore, they will be dealt with along with the provisions applicable to a voluntary winding-up either of the members or of the creditors.

(b) Creditors' voluntary winding-up

Ss. 209A to 209H contain provisions in relation to a creditors' winding-up.

Creditors of a company would be mainly concerned where the company decides to wind itself up by reason of its inability to meet its liabilities. In such a case, the company is obliged to convene a meeting of the creditors on the day, or the day next following the day, on which the meeting for passing the resolution for winding-up is to be held. It must send out the notices of such meeting to the creditors simultaneously with the notice of the company's meeting. The notice must also be advertised in the manner specified in s. 206 (1) [S. 209A (1) & (2)].

The next duty of the directors of the company is to cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the creditors' meeting to be held as aforesaid. They must also appoint one of their number to preside at that meeting who, in his turn, shall be bound to attend the meeting and preside thereat. [S. 209A (3) and (4)].

Now, assuming that the company's meeting for passing the resolution for winding up is for some reason adjourned and the resolution is passed at the adjourned meeting, any resolution passed at the creditors' meeting though prior in date to the resolution for winding-up shall be none the less valid as if it had been passed after the passing of the resolution for winding-up [S. 209A (5)].

At the same meeting, the creditors and the company may respectively nominate a person to be a liquidator for the purposes of the winding-up. If they each nominate a different person, the one nominated by the creditors shall be the liquidator unless, on an application of any director, member or creditor of the company made within seven days after the date of the nomination by the creditors, the Court orders that the person nominated by the company shall be the liquidator instead of or jointly with the one nominated by the creditors, or appoints some other person instead of the person nominated by the creditors. Where, however, the creditors do not nominate anyone, the person, if any, nominated by the company shall be the liquidator. [S. 209B].

Further the creditors may, at the same or any subsequent meeting, appoint a committee of inspection consisting of not more than five persons. In that event, the company may also, at the same or any subsequent meeting, appoint such persons as they think fit to act as members of the committee not exceeding five in number. The creditors may, however, resolve that all or any of the persons appointed by the company ought not to be members of the committee whereupon the persons mentioned in the company's resolution shall not be qualified to act as such. It is open to the Court, however, to give directions contrary to the creditors' resolution or appoint other persons in place of those mentioned in the company's resolution [S. 209].

Remuneration payable to the liquidator is to be fixed by the committee of inspection, if any, or the creditors themselves. Where it is not so fixed, it may be fixed by the Court [S. 209D (1)].

As in the case of a members' winding up, all the powers of directors cease on the appointment of the liquidator except so far as the committee of inspection, if any, or the creditors sanction the continuance thereof [209D (2)].

Vacancy occurring by death, resignation or otherwise in the office of a liquidator other than a liquidator appointed by the Court shall likewise be filled by the creditors. (s. 209E).

GENERAL PROCEDURE IN VOLUNTARY WINDING UP

Sections 211 to 218 contain provisions applicable to any of the aforesaid two kinds of voluntary winding-up of a company. Section 208C is also applicable to a creditors' winding up under s. 209F with a slight modification. Section 208D is almost identical with s. 209G which, in fact, is the old s. 216 (2) slightly altered. Section 208E corresponds to s. 209H which also reproduces the provisions of the old s. 217. All these different sections will be now considered in their proper order.

Section 212 prescribes the powers and duties of a liquidator in a winding-up. It would, however, be more convenient to deal with them in the next lecture as a part of the subject of Liquidators.

It may, however, be noted that a Liquidator, howsoever appointed, may be removed by the Court on a proper cause being shown and another may be appointed in his stead. Similarly, where no liquidator is acting for some reason or the other, the Court may appoint another liquidator. (S. 213). Every liquidator, however, is required to deliver to the Registrar, within 21 days after his appointment, a notice of his appointment in the prescribed form. (S. 214 corresponding to the old s. 208).

The liquidator as a rule has to collect the outstandings of the company and pay off its debts. In the event, however, of the winding up continuing for more than a year, the liquidator must summon

a general meeting of the company, in the case of a member's winding up, at the end of the first year and of each succeeding year or so soon thereafter as may be convenient within 90 days of the close of the year. In the case of a creditors' winding up, he is also required to summon a meeting of the creditors at the same time. Then he must lay before these meetings an account of his acts and dealings and of the conduct of winding up during the preceding year and a statement in the prescribed form with respect to the position of the liquidation. (Ss. 208D & 209G).

When the winding up is completed, a final meeting of the company (and also of the creditors if the winding up is of the creditors) should be called by the liquidator. At such meeting or meetings, he should place an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of. These meetings have to be summoned by advertisement specifying the time, place and object thereof and published one month before the meetings in the manner specified in s. 206 (1) for publishing the resolution for a voluntary winding up.

Within a week after the final meeting, the liquidator should file with the Registrar a return of the holding of the meeting or meetings and the date or dates thereof and a copy of the account. Where, however, at any such meeting, the quorum (in case of meetings held in a creditors' winding up, two persons shall be a quorum at either meeting) is not present, the liquidator should make a return that the meeting was duly summoned and that no quorum was present thereat. Thereupon, the provisions as to the making of the return stated above shall be deemed to have been complied with.

On receiving the account and either of these returns, it becomes the duty of the Registrar to register them and, on the expiration of three months from such registration, the company is deemed to be dissolved. The Court may, however, on the application of the liquidator or any other person interested in the affairs of the company, defer the date on which the dissolution is to take effect for such time as it thinks fit. And in that case, the person on whose application any such order is made should file a certified copy of the order with the Registrar within 21 days. (Ss. 208E & 209H.)

The dissolution of the company thus reached cannot be reopened except in the case of fraud or under s. 243 already referred to.

It may be noted that, if in the course of a voluntary winding up, any difficulty arises which may be best solved by the Court, s. 216 empowers the liquidator or any contributory or creditor to apply to the Court for the purpose, or to exercise all or any of the powers which it might exercise if the company were being wound up under its order. Questions between the company and third parties, however, cannot be determined under this section. *Re Centifugal But-*

ter Co., (1913) 1 Ch. 188. And in a recent Bombay case it was held that Registrar of joint stock companies has no *locus standi* to make an application to the Court for an order for removing a liquidator appointed by a company in voluntary winding-up, and appointing another liquidator in his place. *In re Peoples' International Travel Education & Commerce Co. Ltd.*, 42 Bom. L. R. 1021.

COMPULSORY WINDING-UP PENDING VOLUNTARY ONE

A question may be asked whether the Court can order a compulsory winding-up while the voluntary liquidation of a company is pending. S. 218 which replaces the old s. 219 with a slight but valuable alteration provides that the voluntary winding-up of a company shall not bar the right of any creditor or contributory to have it wound-up by the Court. In the case of a contributory's application, however, it requires that the Court must be satisfied that the rights of the contributories will be prejudiced by the voluntary winding-up. Prior to the amendment, even the creditor had to allege and prove prejudice to himself unless he had the support of a majority of the creditors. The amendment now removes this difficulty in his way to secure the Court's assistance in preserving his interest against any possible jeopardy, provided he could have asked in the first instance for a compulsory winding-up under s. 162. In other words, a creditor who has a right under s. 162 to have the company wound-up compulsorily can exercise that right in spite of the fact that the company has gone into voluntary liquidation. *Sri Gopal Chandra v Narain Das*, (1938) All. 945; *In re James Millward & Co. Ltd.*, (1940) Ch 333. In such a case, however, if the petition is opposed by the company and most of the creditors who wish the voluntary winding-up to continue, the Court is bound to dismiss the petition, for the new section 218 (which corresponds to s. 255 of the English Act, 1929), does not affect the old rule that the Court in such cases is bound to have regard to the wishes of the other creditors. *Home Remedies, Ltd.*, *In re*, (1943) Ch. 1. A liquidator in a voluntary winding-up, at any rate has no right to ask the Court to pass an order for compulsory winding-up by the Court. *Sri Gopal Chandra's case (supra)*.

When such order is made, the winding-up would none the less date from the passing of the resolution for voluntary winding-up. *In the matter of Indian States Bank, Ltd.*, A. I. R. (1934) All. 114. It may also be noted that a voluntary liquidator's remuneration is liable to be reviewed by the Court where a compulsory winding-up has been ordered. *Mortimers, Ltd.*, *In re*, (1937) 1 Ch. 289.

ARRANGEMENT WITH CREDITORS

It has been already seen what the object of a voluntary winding-up is. Accordingly, it is easy to conceive that even a private

arrangement between a company and its creditors may be arrived at in respect to the claims of the latter.

Arrangement by a company with its creditors can be made either in view or in the course of winding-up in the following manner:—

(i) the arrangement to be binding upon the company must be sanctioned by an extraordinary resolution; and

(ii) to be binding upon the creditors, it must be acceded to by three-fourths in number and value of the creditors.

Any creditor or contributory, however, may, within 3 weeks of the completion of the arrangement, appeal to the Court against it, whereupon the Court may amend, vary or confirm the arrangement (S. 215 corresponding to s. 212 of the old Act) When a scheme of arrangement is made with the creditors of the company as a whole, no sanction of the Court is necessary to make it effective. But such scheme should not contain powers or create bodies which are invalid in law. *British-America Nickle Corp. v. O'Brien*, (1927) A. C. 369. Again, if it is made for obviating voluntary winding-up, it is not an arrangement under the section so as to prevent a creditor who has not assented to the scheme from presenting a petition for winding-up. *Contal Radio Ltd., In re*, (1932) 2 Ch. 66.

AMALGAMATION AND RECONSTRUCTION

It must be remembered, however, that such arrangement is not always made merely with a view to close the company's business. A company may be taken into voluntary liquidation by a special resolution for any reason whatever. And it is under this provision that very often companies are voluntarily wound-up with a view to alter the objects, or to deal with the capital of the company in a manner which cannot be adopted by the company as originally constituted, and cannot be carried out or conveniently carried out under the provisions of the Act for the alteration of the memorandum or the reduction of the capital of a company. In such cases, a company may resort to reconstruction or amalgamation.

Reconstruction means the formation of a new company to take over the assets of the old one with the idea that substantially the same business shall be carried on by the same person. *Hooper v Western Countries Co.*, (1892) W. N. 148.

Amalgamation is the blending of substantially two or more undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which holds the blended undertakings. *In re South African Supply*, (1904) 2 Ch. 268, 287.

Now, the scheme of arrangement for any of these two purposes can be carried out *without an intervention of the Court* under ss.

208C and 209F. It must be very carefully noted in this connection that such schemes could be made even when the company is not in course of voluntary liquidation, and now, they can likewise be carried out under the new s. 153B where they involve a transfer of a controlling interest in the shareholding of a company to another company, and with the sanction of the Court under s. 153A in all other cases.

Sections 208C and 209F which reproduce the old s. 213 are very important. Section 208C provides for the power of liquidators to accept shares, etc. as a consideration for sale of the property of the company, when the winding up is at the instance of the members of the company. Where a company is sought to be reconstructed or amalgamated, a special resolution should first be passed to the effect that it is desirable to reconstruct or amalgamate the company, as the case may be and the company may accordingly be wound up voluntarily. The same resolution may also appoint liquidators with authority to them to transfer the undertaking of the old company to a new company in consideration of paid up or partly paid up shares in the new company to be distributed amongst the members of the old company or those who elect to take them. A member may, under this section, dissent from the sale of the undertaking and claim payment in cash for the value of his interest. A dissentient shareholder cannot be compelled to take shares in a new company or the value put upon his interest by the liquidator. Therefore, the dissenting member who did not vote in favour of the special resolution should express his dissent in writing addressed to the liquidator and leave it at the registered office of the company within seven days after the passing of the special resolution. By such written dissent he may require the liquidator either (1) to abstain from carrying the resolution into effect, or (2) to purchase his interest at a price to be determined by agreement or in default by arbitration. If the liquidator elects to purchase his interest, the purchase money must be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution.

If, within a year, an order is made for winding up by or under the supervision of the Court, the special resolution as above stated shall not be valid unless sanctioned by the Court.

Section 209F applies the above provisions of s. 208C to a creditors' winding up with the only modification that the powers of the liquidator under that section shall not be exercised except with the sanction either of the Court or of the Committee of inspection.

As stated above, where two or more companies desire to amalgamate their undertakings, it is done under these sections. In some cases, the amalgamation is effected by the registration of a new company which takes over all the undertakings of the existing com-

panies. In other cases it is effected by one of the existing companies taking over the undertaking or undertakings of the other company or companies, but to do this there must be express provision in the memorandum of association, for it is not within the ordinary scope of the company's objects to purchase the goodwill of another company. *Earnest v. Nicholls*' (1857) 6 H. L. C. 401, 414. On the other hand, it has been held by the Privy Council in a case from Bombay that the scheme does not depend for its validity on the constitution of the company sought to be amalgamated; it rests entirely upon statute and the only question for the Court to consider is whether the scheme is authorised by section 213. *Shamdasani v. Tata Industrial Bank*, 30 Bom. L. R. 1115.

WINDING UP UNDER SUPERVISION OF THE COURT

The Act provides for this kind of winding up in ss. 221-226. When a special or extraordinary resolution has been passed to wind up a company voluntarily, the Court may order that the winding up shall proceed but subject to its supervision and on such terms and conditions as it thinks fit to impose. Two things should be noted in this connection: firstly, that an order under this section which is called a 'supervision order' pre-supposes the existence of a voluntary winding up, and secondly, that no such order will be made where the voluntary winding up has commenced under an ordinary resolution.

The jurisdiction to pass an order as aforesaid is purely discretionary, and in exercising its direction the Court shall have regard to the wishes of the creditors and the contributories as proved to it by any sufficient evidence. It will not, as a general rule, make such order on the petition of a contributory, unless it is satisfied that the resolution for winding up was so obtained that the minority of shareholders were overborne by fraud or improper or corrupt influence. *Re Varieties, Ltd.*, (1893) 2 Ch. 235; *Re Medical Battery Co.*, (1894) 1 Ch. 444.

Effect and advantages of Supervision order

The effect of a supervision order is the same as an order for compulsory winding up except that the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers without the sanction or intervention of the Court in the same manner as if the company was being wound up altogether voluntarily. Another exception is that the power of the Court to order public examination of promoters, directors and other officers under s. 196 shall not be exercised when a company is being wound up under its supervision.

Practical advantages of a supervision order are: (i) the order operates as a stay of actions and other proceedings against the company; (ii) no proceedings can be initiated or continued against the

company without the leave of the Court; and (iii) an additional liquidator may be appointed.

It may be noted here that, as in the case of a compulsory winding up, the company in the present case can be dissolved only by an order of the Court.

LECTURE XV

CONSEQUENCES OF WINDING UP

Consequences as to Shareholders—Consequences as to Creditors—Consequences as to Dispositions by the company—Consequences as to Servants—Consequences as to Officers—Consequences as to Proceedings against the Company—Consequences as to Costs—Consequences as to Documents—Dissolution—Liquidators: (1) in a Winding Up by the Court; (2) in a Voluntary Winding Up; (3) in a Winding Up under Supervision—Liquidator's Power of Disclaimer—Liquidator's Duty as to Pending Winding up—Liquidator's Duty as to Payment into Bank—Winding Up of Unregistered Companies—Defunct Companies.

CONSEQUENCES AS TO SHAREHOLDERS

It has already been stated that a shareholder of a company is liable and bound to pay full amount on the shares held by him. His liability in this behalf continues even after the company is taken into liquidation. But for the purposes of the winding up proceedings, he is described by the Act as a contributory and certain changes are occasioned in his status, rights and liabilities, on the company going into liquidation, as a result of some imperative provisions of the Act.

Contributories

The term 'contributory' is defined by s. 158 of the Act. It means every person liable to contribute to the assets of a company in the event of its being wound up, and in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories includes any person alleged to be a contributory. The section, however, does not state who are the persons liable to contribute to the assets of the company on its being wound up. One must look to s. 156 for that, which says that persons liable to contribute are every present and past member of such company subject to the qualifications mentioned in the section. The qualifications so mentioned deal with the circumstances in which such persons are liable to contribute and also the extent of their liability.

The list of contributories consists of two parts, A and B. A contributory are the present members of the company, i.e., those who are members at the commencement of the winding up. B contributories are the past members of the company, i.e., those who have ceased to be members within a year preceding the winding up. A person who has legally been a member and has ceased to be such is a past member. In the term 'past member' are, therefore, included persons whose shares have been forfeited, surrendered, cancelled, or transferred within the year preceding the winding up, but not a person who has died within that year. *Off. Liqr. v. Jamna Prasad*, 31 All. 417. All such persons are liable to be placed on the B list.

Nature of contributories' liability

S. 159 as amended defines the liability of a contributory. It says that the liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator. In other words, the liability of a contributory, though commencing at the date when he entered into the contract with the company under which he became a member, is only contingent during the winding up inasmuch as, until a call is made, it is nothing more than a mere liability to contribute, if necessary, to the assets of the company for payment of the debts due to its creditors and expenses of the winding up. The liability of a contributory, however, creates a debt under the section and it does not become payable until a call is made. The effect of this provision is to give to the liquidator a new cause of action which a company itself might not have. For instance, if the claim of a company for the realization of any call from a member is barred by limitation, such member becomes liable to pay all that has remained unpaid on his shares including the unpaid call when the company goes into liquidation. *In re Whitehouse*, 9 Ch. D. 595; *Jagannath Prasad v. U. P. Flour Mills Co. Ltd.*, 38 All. 347; *Prayan Prasad v. Gaya Bank Asso. Ltd.*, 10 Pat. 249; *Pokhar v. Flour Mills Co., Ltd.*, A. I. R., (1934) Lah. 1015; *In re East Bengal Sugar Mills, Ltd.*, (1940) 2 Cal. 175. And it is no answer to this statutory liability that there had been an arrangement between a member and the directors to exclude such liability. *Geoffrey v. Sikdar Iron Works, Ltd.*, 59 Cal. 1099. Further, no time runs against the liquidator until he makes a call on the contributories, because under the foregoing provision the liability of a contributory to pay on his shares creates a new debt which becomes payable only when a call is made on him. Let it be observed in this connection that with regard to other claims of the company, whether against the contributories or outsiders, there is no revival of the cause of action on the winding up of a company, and the time continues to run even after a liquidator is appointed. *Hansraj Gupta v. Off. Liqr. of the Dehra Dun Mus-*

seoria Tramway Co., 35 Bom. L. R. 319 (P. C.). If, therefore, a claim of a company is barred before liquidation, the liquidator cannot recover the same. *Upper India Rice Mills v. Jaunpur Sugar Factory Ltd.*, 25 All. L. J. 277. The extent of the liability of the estate of a deceased member is the same as if the deceased had been living at the time of the winding up. The heirs and legal representatives of a deceased member are liable to contribute to the assets of the company in discharge of his liability. In default, proceedings may be taken for administering the property of the deceased contributory and compelling payment thereof of the money due. The surviving coparceners of a contributory who was a member of a joint Hindu family governed by *Mitakshara* are for this purpose deemed to be his legal representatives and heirs (S. 160) S. 161 lays down that if a contributory becomes insolvent after the winding up has commenced, he becomes a stranger to the company and that, although his name remains on the list of contributories, his assignee in insolvency represents him for all purposes and is to be deemed a contributory.

Extent of liability

Now a member on the A list is liable to the extent to which his shares are not fully paid up. But the liability of a member on the B list arises only if (1) it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them, and (2) the debts incurred by the company while he was a member remain unpaid after applying all the contributions of the A contributories and all the assets of the company *pari passu* towards payment of all its debts irrespective of the date when they were incurred. Even if this second condition were present, a past member would have to pay nothing if the transferee of his shares had paid for them in full. In other words, a past member is liable to be called upon to pay only so much of the amount, if any, on the shares that may have remained unpaid by his transferee as a present member as is necessary to pay the debts or any part thereof incurred while he was a member.

Claim to set-off

At any rate, a fully paid shareholder cannot be put on the list of contributories merely to give the Court the power to order him to pay his other debt to the company. In *re G. E. B.* (a debtor), (1903) 2 K. B. 340. He may be, however, put on the list with his consent because though he is not liable for calls, he is entitled to share in the surplus assets of the company. *Re Anglesea Colliery Co.*, 1 Ch. 555.

It may be that as against the liability of a contributory under the above provisions, there may be some amount due to him from

the company in his character as a member in the form of dividends, profits or otherwise. S. 156 (1) (vii) provides that in such a case the sum due to such contributory shall not be regarded as the debt due from the company where the claim of any outside creditor of the company is outstanding. It means that the contributory in that case has to make his contribution to the assets of the company without any right to claim a set-off in respect of the amount due to him from the company by way of dividend, profits or otherwise. In any case, such sum will be taken into account for the purpose of the final adjustment of the rights of the contributories *inter se*.

As regards moneys due from a contributory of the company on any other account, the Court may order him to pay them in the manner directed by it, and no set-off in respect of any amount that may be due to him from the company on any independent dealing or contract can be allowed to him except in the case of an unlimited company, or unless such contributory is a director of a limited company with unlimited liability. *Chandhok v Pearey Lal*, A 1 R (1942) All. 136. The set-off in respect of any such moneys or any other amount due to him in respect of any dividends may, however, be allowed in any case against any subsequent call if, without the aid of any contributions from the contributories, all the creditors of the company are paid off out of the assets of the company. (S 186) It will be observed that the provisions of sub-section (1) of s 186 invest the Court with a discretion whether to grant or refuse to grant an order against a contributory in respect of a claim other than a call. Where, therefore, the Court refuses to grant such order, the liquidator must proceed by way of a civil suit to enforce the claim, and it would be open to the contributory to plead the ordinary legal defences including a right to set-off to such a claim. There is nothing in s. 186 which can reasonably be construed as a general deprivation of contributories of the right of set-off. *Shri Nath Sah v. Off. Liqr. Benares Bank, Ltd.*, (1941) All. 153 (F. B.).

Director-Contributory

One more provision may be noted here as regards a contributory who is also the director of a company. S. 157 of the Act describes the liability of a director on winding up of a limited company. It says that a director, present or past, whose liability is unlimited (p 129) is liable to contribute to the assets of the company to an unlimited extent over and above his liability (if any) to contribute as an ordinary member in the event of the company going into liquidation. But there are limitations to this liability. A past director is not liable if he has ceased to be a director for a year or upwards before the winding up. Secondly, a past director shall not be liable in respect of any debt or liability of the company contracted after

he ceased to hold office. And thirdly, subject to the articles of the company, a director, present or past, shall not be liable to make any contribution unless the Court deems it necessary in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up. It will be observed that even a present or past director will not ordinarily be called upon to make any contribution in pursuance of his unlimited liability until it is found that all the present and past members of the company are not in a position to satisfy the debts of the company. In fact, he may be called upon to contribute practically after all the resources of the company are exhausted and yet the debts of the company are not completely discharged.

Enforcement of liability

Now, the liability to contribute, of both past and present members, is enforced by means of calls. When the winding-up is by the Court, the liquidator makes calls with the sanction or under an order of the Court. On a voluntary winding-up the liquidator can make calls without the sanction of the Court. As soon as the call is made, the debt created by the liability of the contributory on winding up becomes payable.

Restriction of transfer of shares, etc.

In addition to the liability imposed by the foregoing provisions on the members of a company in the event of its being wound up, s. 227 of the Act imposes a sort of restriction on them, viz. that in the case of a voluntary winding up no transfer of shares except transfers made to or with the sanction of the liquidator shall be made and that every alteration in the status of the members of the company after the commencement of such winding-up shall be void. In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding up shall be void unless the Court otherwise directs. The principle on which the provisions with regard to disposition of company's property is based is that in all winding up (as well as bankruptcy) all unsecured creditors should be paid *pari passu* and the Court will not tolerate any conduct on the part of the company or its directors which has the effect of giving preference to one creditor or a set of creditors over the other creditors of the company.

It may be noted here that though shares cannot be transferred except with the sanction of the liquidator or the Court, as the case may be, debentures may be transferred without any objection whatever.

CONSEQUENCES AS TO CREDITORS

It has been stated in the preceding lecture that a company can never be declared bankrupt. But, all the same, distinction is to be made, as regards the rights of the creditors of a company which is being wound up, as between the winding up occasioned by reason of the company being unable to pay its debts and the one occasioned by any other reason while the company is perfectly solvent. In the former case, the company is to be deemed insolvent, and the same rules prevail as to (1) the respective rights of secured and unsecured creditors, (2) debts provable, and (3) the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to estates of persons adjudged insolvent (s. 229). While in the latter case, namely, where a solvent company is being wound up, all debts payable on a contingency and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, as far as possible, of the value of such debts or claims as may be subject to any contingency, or for some other reasons do not bear a certain value (s. 228). It may be noted here that liquidators are not bound by decrees which the creditors may have obtained against the company, and they are entitled to go behind such of them as they consider were not properly obtained. *Off. Liqs. Gorakhpur Electric Supply Co. v. Siemens (India) Ltd.*, (1940) All. 730

Proof of Debts

Now, debts or claims are to be proved within the time to be fixed by the Court (s. 191). A creditor who does not prove does not lose his right altogether. He can prove so long as there are any assets undistributed. He cannot, however, disturb any former dividend.

No difficulties would arise where a solvent company is being wound up. The creditors have merely to prove their claims, and that being done, they are paid off out of the assets of the company.

In the case of an insolvent company, however, one must analyse and examine the provisions of s. 229 stated above. The expression 'rules' in the section is interpreted to import the provisions contained in any section of the Insolvency Acts and rules made thereunder unless there is already a provision in the Companies Act providing for the matter. *Hansraj v. Off. Liqr.*, 51 All. 695. On this principle, it seems to have been held in a case by the Bombay High Court that s. 49 of the Presidency Towns Insolvency Act can apply to give any Crown debt as distinguished from those mentioned in s. 230 (1) (a) a first priority. *Motor Emporium Co. v. Moos*, 29 Bom. L. R. 1446. It is submitted that, even under the decision of the Allahabad High

Court in *Hansraj's case*, as s. 230 of the Companies Act exhaustively provides the kinds of debts which are entitled to priority in a winding up, s. 49 of the Presidency Towns Insolvency Act cannot be made applicable under s. 229 so as to entarge the provisions of s. 230 and give priority to any Crown debts other than those mentioned in that section. This view has been expressed by the Calcutta and Lahore High Courts and it has been held that a trade debt due to the Crown is not entitled to priority in the winding up of a company. *Northern Bengal Co. Ltd., In re.*, (1937) 1 Cal 684, *Secretary of State v. Punjab Industrial Bank, Ltd.*, 12 Loh. 678. And now, it has been held by the Privy Council in a recent case that the Crown is bound by the provisions of the Act and is, accordingly, not entitled to any prerogative, priority or preferential rights or treatment, save those expressly conferred and limited by the Act itself, in particular by Ss. 230 and 232(2). *Governor-General v. Shiromani Sugar Mills*, 48 Bom L R. 482 (P.C.).

In liquidation proceedings of an insolvent company, a secured creditor under this section may do one of three things: (1) he may rely on the security and ignore the liquidation altogether; (2) he may value his security and prove for the balance of his debt; or (3) he may give up his security and prove for the whole amount. A secured creditor, however, who realizes his security cannot prove for interest due after winding up when claiming the balance of the amount. He can prove for the balance and interest upto winding up only. *Quartermaine's case*, (1892) 1 Ch 539. An attaching creditor whose attachment does not mature by sale thereunder is not a secured creditor only by reason of his attachment. *Goverdhandas v. Official Liquidator*, 31 Bom. L. R. 1209.

Unsecured creditors of an insolvent company are paid in the following order.—

- (1) preferential payments under s. 230 (*infra*),
- (2) other debts *pari passu*.

But debts in respect of which a rate of interest is paid varying with the profits of the company are postponed until other debts are paid in full.

A creditor can prove for interest on his debt up to the date of the winding up in the case of an insolvent company wound up either voluntarily or compulsorily. If the company is solvent, i.e., if there is a surplus after paying the capital and interest on all debts upto the commencement of the winding up, interest is payable from that date upto the date of payment, but no interest would be paid to the creditors whose debts do not carry interest even when the company is found to be solvent. *Off. Receiver, High Court, Madras v. Rao & Co.*, A.I.R. (1948) Mad. 64.

All claims can be proved in winding up except claims which are, by an order of the Court, declared to be incapable of being fairly estimated. *Hardy v. Fothergill*, 13 A. C. 351.

Preferential payments

Where the assets of the company available for payment of general creditors are insufficient to meet them, certain unsecured debts are paid even before the debenture-holders under any floating charge and before payment of any other debt of the company. These preferential payments have been already mentioned in the lecture on debentures. They are: (1) rates and taxes having become due and payable to the Crown (*supra*) or to a local authority within the twelve months next before the commencement of the winding up; (2) wages of a clerk or servant for the two months before the winding up not exceeding Rs. 1,000 for each clerk or servant, (3) wages of a workman for two months before the winding up not exceeding Rs. 500 for each; (4) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company; (5) all sums due to any employee from a provident, pension, gratuity or any other fund maintained by the company; and (6) the expenses of any investigation held under s 138 (iv). These debts shall rank equally among themselves and be paid in full, unless the assets are insufficient in which case they shall abate in equal proportions. It may be noted here that these preferential payments have priority also over a landlord's right of distress, if exercised within three months before the date of the winding up order and they are a first charge on the goods so distrained or the proceeds of sale. But in this last case, if any money is paid to any person having a right to a preferential payment as aforesaid, the landlord shall have the same right of priority as the person to whom the payment is made (S. 230).

CONSEQUENCES AS TO DISPOSITIONS BY THE COMPANY

Fraudulent preference

As regards the dispositions of the properties of a company, the bankruptcy rule as to fraudulent preference applies when an insolvent company is being wound up. S 231 of the Act provides for this and states that any transfer, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference. (See s. 56 of the Presidency Towns Insolvency Act). In order to prove a fraudulent preference under this section, it must be shown that (1) the transaction took place within 3 months of the presentation of

the petition in case of a winding up (either originally or pending a voluntary winding up) by or subject to the supervision of the Court and of the resolution in the case of a voluntary winding up [*Chennakesava v Official Liquidator*, A I R (1943) Mad 54], and (2) that the dominant motive in the mind of the company, acting by its directors, was to prefer one creditor to the others. In *re Jackson and Bassford*, (1906) 2 Ch 467. The test is whether the proper inference to draw from the facts is that the dominant motive actuating the debtor is that, in making the transfer the debtor is doing what he himself felt bound or compelled to do. If so the case is not of a fraudulent preference. *Nabin Kishori v Jagdishwar*, A I R (1933) Cal 809. In *re M I G Trust Ltd* (1933) Ch 542. But in a case where out of a number of creditors two at least were left unheard while the rest were satisfied by the assignment of promissory notes or other valuable securities it would be proper to find that there was on the part of the company an intent to prefer within the meaning of s 231. *Chennakesava's case* (supra). Further under clause (b) of this section any transfer or assignment by a company of all its properties to trustees for the benefit of all its creditors shall be void. This includes a floating charge over all the assets of the company for the benefit of all its creditors. *London Joint City Bank v Herbert Dickinson Ltd*, (1922) W N 13. Where however loans are advanced in pursuance of an agreement to issue debentures but the debentures are issued within 3 months of the winding up of the company the debentures will not be held invalid on the ground of fraudulent preference. In *re Stanton Ltd* (1929) 1 Ch 180.

Floating charge when invalid

Every floating charge is not valid for the purposes of the winding up. S 233 says that a floating charge on the property or undertaking of a company created within three months of the commencement of the winding up shall unless it is proved that the company immediately after creation of the charge was solvent be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of and in consideration for, the charge together with interest thereon at the rate of 5 percent per annum. This section, however, does not touch the question of a fraudulent transfer of debentures. It must be remembered that every floating charge crystallizes and becomes a fixed charge on the winding up of the company.

CONSEQUENCES AS TO SERVANTS

A winding up order by a Court operates as a dismissal or discharge of the servants of the company. *Chapman's case*, 1 Eq 346; s 172 (3). And such discharge relieves the servant from all obliga-

tions under his contract of service. Thus, where A agreed to act as a director of the company for seven years and not to engage in any competing business for seven years after he should cease to hold office, and the company was ordered to be wound up, it was held that the winding up order operated as a wrongful dismissal of A, and that he was free from his agreement not to compete with the company. *Measures Bros. Ltd. v. Measures*, (1910) 2 Ch. 248.

A voluntary winding up also in most cases operates as a discharge of the company's servants. In *Midland Counties District Bank v. Attwood*, (1905) 1 Ch. 357, it was held that the resolution for winding up did not operate as a discharge of the servants. The ground of this decision was that the corporate existence and corporate powers of the company subsisted, notwithstanding the winding up, and that as the liquidator was appointed by and was an officer of the company there was no change in the personality of the employer as to dismiss the servants. But in a later case *Reigate v. Union Manufacturing Co.*, (1918) 1 K. B. 592, the Court of Appeal considered the question and Scrutton, L. J., after referring to the headnote to the *Midland Bank's* case observed :

"If that means that a resolution for voluntary winding up is never to discharge the servants of the company. I cannot agree with it. It seems to me that it may or may not be a discharge of the servants according to the facts of the particular case."

This decision virtually overrules the former. Where an appointment is for a fixed period, it becomes a question of construction whether there is a definite agreement by the company to provide employment for the period named, in which case no term will be implied authorising the company to discontinue its business by a resolution for voluntary winding up during that period. Where there is no such definite agreement, the resolution for winding up would operate as a discharge of the employee. *Fowler v. Commercial Timber Co.*, (1930), 2 K. B. 1; *Railway & Electric Co., In re*, 38 Ch. D. 597.

CONSEQUENCES AS TO OFFICERS

The expression 'officer of the company' may include the secretary, solicitor, or auditors of the company, but it does not include a share-broker. *G. Tiruvengadachariar v. Velu Mundaliar*, (1938) Mad. 192.

It has been stated in the preceding lecture that, on the winding up of a company, the powers of the directors usually cease.

It has been further stated that the Court may call any officer of the company or any person indebted to the company, or who has property of the company in his possession, or who can give any information as to the company and order him to bring with him any books and documents relating to the company.

A reference has also been made to the power of the Court to order public examination of any person who has taken part in the promotion of the company, or has been a director or officer of the company, on a report by the official liquidator that fraud has been committed. There need only be a *prima facie* case of suspicion on the part of such liquidator. *Re Bank of Hindustan*, 13 Eq. 178.

Misfeasance claims of the company

Then again the officers may be liable for misfeasance under s. 235 of the Act. If any promoter, director, liquidator or officer of the company has misapplied or retained money or property of the company or has been guilty of misfeasance or breach of trust, the Court may, on the application of the liquidator, or of any creditor or contributory, examine into his conduct and order him to repay or restore money or property or to pay compensation. Proceedings under this section, however can be brought against the officer concerned during his lifetime and within the period of limitation prescribed by the section. The right to bring or continue such proceedings does not survive his death, and no question of the application of the maxim '*actio personalis moritur cum persona*' arises in relation thereto. *Offi. Liq. Muffasil Bank v Jugal Kishore*, (1939) Mad 6, *Manilal v Vandravandas*, A. I R (1944) Bom. 193; *Sankaram v Kottayam Bank*, A I R (1946) Mad 304. Prior to the Amendment Act, 1936, the Indian Limitation Act applied to an application under this section as if such application were a suit. This provision, however, led to a divergence of views among the High Courts as to the precise article of the Limitation Act which applied to such application. The Bombay High Court held that it was governed by art. 120 of the Limitation Act and not by article 36, 115 or 116. *Govind v. Raghunath*, 32 Bom. L. R. 232. The Madras and Allahabad High Courts also held the same view. *Rama Seshayya v. Shree Tripurasundari Cotton Press, Bezwada*, 42 Mad. 468; *In the matter of the Union Bank of Allahabad, Ltd.*, 47 All. 669. But the Lahore High Court assented from that view. *Bhimsingh v. Liquidator, Union Bank of India*, 8 Lah. 167. The conflict is now set at rest by the Amendment Act, 1936, which amends s. 235 and provides that the application should be made within 3 years from the date of the first appointment of a liquidator, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

Criminal liability and prosecution

The next section provides punishment for falsification, destruction, mutilation, alteration or fraudulent secretion of any of the books, papers or securities of the company which is being wound up.

The gist of the offence is the intention to defraud or deceive any person.

S. 237 is replaced by an entirely new section, sub-sec. (6) whereof is again split up into two sub-sections with sub-sec. (7) renumbered as sub-sec. (8) by the amending Act II of 1938, and it provides the procedure for the prosecution of delinquent directors, managers and other officers.

If, in the course of a winding up by, or subject to the supervision of, the Court, it appears to the Court that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company, it may either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the Registrar. In the latter case, if the Registrar considers it to be a fit case for prosecution, he shall place the papers before the Advocate-General or the public prosecutor and if so advised institute proceedings for the purpose. No prosecution shall, however, be undertaken unless an opportunity is given to the accused person to make a statement in writing to the Registrar and of being heard thereon.

Similarly, if in the course of a voluntary winding up, it appears to the liquidator that any such person as stated above has been guilty of a criminal offence in relation to the company, he shall forthwith report the matter to the Registrar. The Registrar may in this case do either of the three things, viz., (i) he may proceed as when the matter is referred to him by the Court; (ii) he may refer the matter to the Central Government for further inquiry whereupon they shall investigate the matter and, if thought expedient, may apply to the Court for an order conferring on any person designated by them all such powers of investigating the affairs of the company as are provided by the Act in the case of a compulsory winding up; or (iii) if he is of opinion that the case is not a fit one for prosecution, he shall inform the liquidator accordingly. The liquidator in such a case, if he holds a different opinion, may himself take proceedings against the offender after securing a sanction of the Court. In case, however, the liquidator does not make a report to the registrar as he should, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such report which, on being made, shall be dealt with by the Registrar in any one of the three ways mentioned above.

In connection with every prosecution in pursuance of these provisions, it shall be the duty of the liquidator and of every officer and agent of the company, past and present (other than the defend-

ant in the proceedings), to give to the Registrar all assistance he is reasonably able to give. 'Agent' here includes any banker, legal adviser or auditor of the company. In case of default, the Court may, on the application of the Registrar, direct performance of that duty. Where the liquidator is in default, the Court may order him to pay the costs of the application personally unless it appears that the default was due to the liquidator not having in his hands sufficient assets of the company.

S 238 provides penalty for false evidence. If any person upon any examination upon oath authorised under the Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment as well as fine.

In addition to the aforesaid penal provisions the Amendment Act, 1936, has introduced another omnibus section 238A which reproduces s 271 of the English Act, 1929. It provides penalties of imprisonment for a number of offences committed by officers of companies in liquidation either antecedent to or in the course of winding up.

Considering the extensive penal provisions now to be found in the Act in respect of almost every requirement of the Act, Palmer rightly says that there are very few requirements of the Act which are not fortified with penalties in case of default. Fines are in many cases imposed on the company and upon 'any officer who is in default,' and in some cases, imprisonment is mentioned.

CONSEQUENCES AS TO PROCEEDINGS AGAINST THE COMPANY

It has been stated that after the winding up petition is presented, the Court may stay all proceedings against the company. After the winding up order is made all proceedings against the company must cease even without any stay order by the Court, unless the Court gives special leave for them to continue. An appeal filed against a company after the passing of a winding-up order, without leave of the Court, is no valid appeal; and a subsequent application for leave 'to continue the appeal' is in reality only an application or leave to commence or launch an appeal; and if such application is made at a time when the appeal is time-barred, the application will necessarily be rejected by the Court. *Maharaj Kishore Khanna v Benares Bank Ltd.* (1941) All. 565. Similarly, where a suit is filed against a company after it has been ordered to be wound up, without the leave of the Court the Court has no jurisdiction to grant leave to the plaintiff to continue his suit. In such a case, the Court has inherent jurisdiction to dismiss the suit on an interlocutory

application. *Har Narain Misra v. Kanahiya Lal*, (1939) 2 Cal. 425. Further, any distress or execution put in force against the assets of the company after the commencement of the winding up is void. (S. 232). These rules also apply to a winding up under supervision. But on a voluntary winding up, the Court may restrain proceedings against the company if it thinks fit. *In re Margot Bywaters, Limited*, (1942) Ch. 121.

CONSEQUENCES AS TO COSTS

Lastly, the costs ordered to be paid by the company while in liquidation of any action brought or defended by it have to be paid first out of the assets of the company. Similarly, all costs, charges, and expenses properly incurred in the winding up are payable out of the assets of the company in priority to all other claims except those of the secured creditors, if any. (S. 217)

CONSEQUENCES AS TO DOCUMENTS

Firstly, where a company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, *prima facie* be evidence of the truth of all matters recorded therein (S. 240).

Secondly, after an order for winding up by, or subject to the supervision of, the Court is made, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any document in the possession of the company may accordingly be inspected by creditors or contributories (S. 241).

Lastly, when a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of, in the case of winding up by, or subject to the supervision of, the Court, in such a way as the Court directs, and in the case of a voluntary winding up, in such a way as the company by extraordinary resolution directs. Irrespective of whether they are thus disposed of or not, no liability shall rest on the company, or the liquidators or any person to whom the custody of the documents has been committed after three years from the dissolution of the company by reason of the same not being produced to any person claiming to be interested therein. (S. 242).

DISSOLUTION

Winding up of a company ultimately results in its dissolution whereupon its corporate existence comes to an end. When the affairs of a company have been completely wound up as a result of the Court's order for winding up, the Court makes an order that the company be dissolved from the date of the order, and the company

is accordingly dissolved. The order is then reported within 15 days by the official liquidator to the Registrar who makes a minute of the dissolution of the company in his books. In case of default, the liquidator is liable to be fined to the extent of Rs. 50 per day. (S. 194). If on such dissolution, any assets of the company remain undistributed, they pass to the crown as *bona vacantia*. If any assets are found or recovered after the dissolution, motion is usually made to set aside the dissolution under s. 243 by the liquidator or any other person interested within two years from the date of the dissolution.

Where, however, a company is being wound up voluntarily, it is dissolved quite in a different manner without any order of the Court. The procedure for the purpose is now laid down in ss. 208E and 209H according as the winding up is of the members or of the creditors. Within a week after final meeting or meetings, as the case may be, the liquidator is required to send a copy of his final account and a return of the holding of the meeting or meetings to the Registrar. The Registrar forthwith registers them in his books and on the expiration of 3 months from such registration, the company is deemed to be dissolved. The Court, in such a case, has only the power to defer the date of dissolution on the application of the liquidator or any other person interested. S. 243, however, applies to a dissolution even under these provisions.

A company which is being wound up subject to the supervision of the Court can be dissolved only in the manner provided in s. 194 referred to above.

LIQUIDATORS

It now remains to consider the question of liquidators, how they are appointed and removed and their powers and duties as laid down by the Act. It will be remembered that, in every winding up, a liquidator must be appointed. But it must be noted that the mode of appointing him depends upon the mode in which the company is wound up. It would therefore be convenient to deal separately with liquidators as appointed under each of the three different modes of winding up which have been already noticed.

1) IN A WINDING UP BY THE COURT

S. 175 of the Act deals with the appointment of a person as an official liquidator when a company is ordered to be wound up by the Court. Such appointment is made as soon as the winding up order is made. Where it is not so made, the new s. 171A provides that the official receiver attached to the Court shall automatically become the official liquidator of the company and forthwith take into his custody and control all the books, documents and assets of the com-

pany. He shall continue to act as such until his discontinuance by the Court. The Court may also after giving notice to the company, unless dispensed with for reasons recorded, appoint a provisional liquidator after the presentation of a petition for winding up, and before the winding up order is made.

Now the Court may appoint one or more persons as official liquidators, and in that event, declare whether any act required or authorized to be done by the official liquidator is to be done by all or any one or more of such persons. It may also determine if any and what security is to be given by any official liquidator on his appointment. The section further lays down a very important rule that the act of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment provided that nothing in the section shall be deemed to validate any acts done by him after his appointment is shown to be invalid. Furthermore, the Court will not appoint a receiver of the assets in the hands of an official liquidator.

The next section provides that an official liquidator may resign, or be removed by the Court on a proper cause being shown, (e.g., incapacity, etc.) and the vacancy may be filled up by the Court. Until the vacancy is so filled up, the official receiver shall be and act as the official liquidator. The Court may also determine the remuneration of the liquidator, by percentage or otherwise, and also fix the proportion for distribution of such remuneration among the liquidators where they are more than one.

S 177 says that the liquidator so appointed shall not be described by his individual name but as the official liquidator of a particular company, and s 178 empowers him to take into his custody all the property, effects and actionable claims of the company which are to be deemed to be in the custody of the Court as from the date of the winding up order. It must be carefully noted in this connection that the property of the company does not vest in the liquidator. He is a trustee for all persons who were creditors of the company at the date of the winding up. He in fact represents both the company and the creditors.

Statement to the Liquidator

To facilitate the work of the liquidator, the Amendment Act, 1936, by the new s 177A requires a statement to be submitted to him as to the affairs of the company unless the Court otherwise orders. Where a provisional liquidator is appointed, such statement should be submitted to him.

The statement must contain the following particulars:

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;

(b) the debts and liabilities,

(c) the names addresses and occupations of the creditors stating separately the amount of secured debts and unsecured debts and in the case of the former particulars of the securities their value and the dates when they were given,

(d) the debts due to the company the names addresses and occupations of the persons from whom they are due and the amount likely to be realised therefrom

The statement when made out must be verified by an affidavit by one or more of the directors and the secretary manager or other chief officer of the company. The official liquidator may however, subject to the direction of the Court require it to be verified either by the persons (i) who at or have been the directors of the company, or (ii) who have taken part in the formation of the company within one year before the date of the order or the appointment of the provisional liquidator or (iii) who are or have been in the employment of the company within the same period or (iv) who are or have been within that period officers of or in the employment of a company which is or within the said year was an officer of the company to which the statement relates.

The statement must be submitted within 21 days from the date of the order of winding up or of the appointment of the provisional liquidator as the case may be. The time may however be extended by the liquidator or the Court for special reasons. Costs and expenses incurred in this behalf shall be payable out of the assets of the company subject to an appeal to the Court.

The statement so submitted shall be open to inspection by any person taking himself a writing, as a creditor or contributory of the company at all reasonable times on payment of the prescribed fee. A copy or extract therefrom can also be had if the person so desires.

Default in compliance with the requirements of the section is made punishable with fine to the extent of Rs. 100 per day. Similarly, any person untruthfully stating himself to be a creditor or contributory of the company would be guilty of an offence under s. 182 of the Indian Penal Code and on the application of the liquidator or of the official receiver be punishable accordingly.

Statement by the Liquidator

After the receipt of the statement under the foregoing provisions or where the Court orders that no such statement shall be submitted the official liquidator is required by another new s. 177B to submit a preliminary report to the Court not later than four or with the leave of the Court, six months from the date of the winding up order. The report must be as regards (a) the amount of

capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately under the heading of assets particulars of cash and negotiable securities, debts due from contributories, debts due and securities, if any, available to the company, movable and immovable properties of the company and unpaid calls; (ii) if the company has failed, as to the cause of the failure; and (iii) whether any inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of its business. The liquidator may, if he so likes, make a further report or reports as to any other matters, such as the fraud committed by any officer of the company in or since its formation, which, in his opinion, should be brought to the notice of the Court.

Committee of Inspection

The Amendment Act, 1936, further introduces s. 178A based on s. 199 of the English Act, 1929, for the appointment of a committee of inspection to help the liquidator in the winding-up. For this purpose a duty is imposed upon the liquidator to convene a meeting of the creditors of the company within a month from the date of the winding up order in order to ascertain whether or not such committee should be appointed to act with the liquidator and also who are to be the members of such committee, if appointed. Within a week thereafter, the liquidator is further required to convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications. If the contributories do not accept such decision in its entirety, the liquidator should apply to the Court for directions as to whether there should be a committee of inspection and, if so, what should be the composition of the committee and who shall be the members thereof. At any rate, the committee, howsoever appointed, must not consist of more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

The committee is empowered by the section to inspect the accounts of the liquidator at all reasonable times. They must meet at least once a month and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary. They may act by a majority of their members present at the meeting but cannot act unless a majority of the committee are present.

A member of such committee may resign by notice in writing signed by him and delivered to the liquidator. If, however, a member becomes bankrupt, or compounds or arranges with his creditors

or remains absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or the contributories as the case may be his office would thereupon become vacant.

Besides a member of the committee may be removed by an ordinary resolution of the creditors or contributories whom he represent. Seven days' notice stating the object of the meeting must however be given in such case.

Any vacancy occurring on the committee is to be filled by a resolution passed at a meeting of the creditors or of the contributories, as the case may be which must forthwith be summoned by the liquidator. The continuing members of the committee if not less than two may continue to act in the meantime.

Powers of an Official Liquidator

These are described in s. 179 of the Act and can be had only with the sanction of the Court. But the Court under the next section may at any time make an order providing that the official liquidator may exercise any of these powers without its sanction or intervention and where a provisional liquidator is appointed may limit and restrict his powers by the order appointing him.

Now the powers conferred by the section are

(1) to bring and defend actions in the name of the company,
(2) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company.

(3) to sell and transfer the property of the company by public auction or a private contract.

(4) to execute and seal documents and deeds on behalf of the company,

(5) to prove rank and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in respect thereof,

(6) to draw accept make and endorse any bills of exchange, hundis or promissory notes with the same effect as if drawn etc., by the company in the course of its business,

(7) to raise money on the security of the assets,

(8) to take out in his own name letters of administration to any deceased contributory,

(9) to do all other things as may be necessary for winding up the affairs of the company and distributing the assets, and

(10) to appoint an advocate or pleader entitled to appear before the Court in order to assist him in the performance of his duties provided that where the official liquidator is an attorney, he shall not appoint his partner unless the latter consents to act without remuneration (S. 181).

In connection with the aforesaid powers, reference may well be made to what Jessel, M. R. observed in *In re Wreck Recovery and Salvage Company*, 15 Ch. D. 353 at p. 360 in regard to the liquidators' power to carry on the business of the company so far as may be necessary for the beneficial winding up of the company:

"Now, the word 'necessary' means that it must not be merely beneficial but something more, though the necessity must be determined by the Court, having regard to all the circumstances of the case. It does not, of course, mean that no other course would be possible. Then it must be for the 'beneficial winding up' of the business of the company; therefore, it must be with a view to the winding-up of the company, not with a view to its continuance."

It may be noted here that no liquidator, official or otherwise, as representative of a company in liquidation, has a right of audience in any proceeding in a suit brought by such company in the ordinary original jurisdiction of a High Court. *Eastern Tavoy Minerals Corpn. Ltd. v. Clarke, Rawlins, Ker & Co.*, (1937) 2 Cal 173.

Duties of an Official Liquidator

The duties of an official liquidator besides those already mentioned are prescribed by ss. 182 and 183 of the Act. Under the former, as amended by the Amendment Act, 1936, he is required to keep proper books in which entries or minutes of proceedings at meetings and of such other matters as may be prescribed are to be made. And any creditor or contributory may, subject to the control of the Court, personally or by his agent, inspect such books. The liquidator is further required twice a year to present to the Court an account in duplicate of his receipts and payments as such liquidator in the prescribed form and verified by a declaration in the prescribed form. The Court in its turn is required to cause that account to be audited in any manner it thinks fit, and after the audit, one copy should be kept by the Court and the other copy should be delivered to the Registrar for filing. Each of these copies would be open to inspection by the creditors or any other interested person. The next section provides that the official liquidator shall have regard to any directions that may be given by resolution of the creditors and the contributories at any general meeting or by the committee of inspection in regard to the administration and distribution of assets among the creditors. Secondly, he may in his discretion summon general meetings of the creditors and contributories in order to ascertain their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories may by resolution direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

Besides having to pay regard to the directions of the creditors and the contributories as aforesaid, an official liquidator is entitled

to use his own discretion in the administration and distribution of the assets among the creditors. He may also apply to the Court for directions in relation to any matter arising in the winding-up.

If any person is aggrieved by any act or decision of the official liquidator, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision and make such order as it may think just in the circumstances.

(2) IN A VOLUNTARY WINDING-UP

A voluntary winding-up of a company may now be either a members' winding-up or a creditors' winding-up. The mode of appointing liquidators in each case has been already treated in the preceding lecture and, therefore, need not be repeated here.

Powers and duties of Liquidators

The liquidator in a voluntary winding-up is not really a trustee for the creditors or the contributories nor is he an officer of the Court. He occupies the position of a paid agent of the company, and if he neglects his statutory duties to creditors or contributories, he will be liable to them in damages. He will also be liable for misfeasance if he pays money to a person who has no claim against the company. *Windsor Steam Coal Co., In re*, (1929) 1 Ch 151.

Prior to the amendment of the Act in 1936, the powers and duties of a liquidator in a voluntary winding-up were dealt with in s. 207 of the Act. Since the amendment, however, they are to be found in s. 212 with material additions and alterations. This section is based upon s. 248 of the English Act, 1929.

Firstly, the liquidator may in the case of a member's voluntary winding-up, with the sanction of an extraordinary resolution of the company, and in the case of creditors' voluntary winding-up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by cls. (d), (e), (f) and (h) of s. 179 to a liquidator on a compulsory winding up. The exercise of these powers or any of them, however, shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

Secondly, he may, without being in need of any sanction whatever, exercise any of the other powers given by the Act to the liquidator in a compulsory winding up. These powers, it will be remembered, include the power to carry on the business of the company so far as may be necessary for the beneficial winding-up of the company. If, therefore, in the proper exercise of this power, he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the

commencement of the winding-up. **In re Great Eastern Electric Company, Limited.** (1941) Ch 241. He has, however, no inherent power to refer disputes on behalf of the company to arbitration nor can such power be claimed for him as an incidental power in relation to any of his express powers under the Act. **Dunichand & Co. v Narain Das & Co.,** A I R (1947) 1 Ah 355 (F B).

Thirdly he may exercise the Court's power of making calls.

Fourthly, he may exercise the Court's power of settling the list of contributories which shall be *prima facie* evidence of the liability of persons named therein.

Lastly he may summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

The only duty of a liquidator as prescribed by the section is that he shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

Where several liquidators are appointed any of the powers as aforesaid may be exercised by such one or more of them as may be determined at the time of their appointment or in default of such determination by any number not less than two.

(3) IN A WINDING UP UNDER SUPERVISION

In a winding up subject to supervision of the Court the Court may appoint a liquidator in addition to the liquidator already appointed and he will have the same powers as if he had been appointed in the voluntary liquidation. Similarly the Court may remove any liquidator already appointed and continued by the Court or appointed by the Court and may also fill any vacancy.

Powers and duties of a Liquidator

As a result of the discretion of the Court in making the supervision order and appointing a liquidator as aforesaid it follows that the liquidator in such a case can exercise all powers without the sanction of the Court as in a voluntary winding-up but subject to such restrictions as may be imposed by the Court while making the supervision order and the appointment of a liquidator, if any. In other words though no liquidator is appointed by the Court it has got a discretion while making the supervision order to restrict the powers of the liquidator already appointed by the company.

LIQUIDATOR'S POWER OF DISCLAIMER

The new s 230A introduced by the Amendment Act 1936, confers a new power upon a liquidator in any winding-up to disclaim land burdened with covenants, stocks and shares, unprofitable contracts or other property which is unsaleable. The section is almost a *verbatim* reproduction of s 267 of the English Act, 1929.

The liquidator in connection with any such property may have attempted to sell the property or exercised some act of ownership over it. Still he may, with the leave of the Court and subject to the provisions of the section disclaim it by writing signed by him at any time within 12 months after the commencement of the winding up or such extended time as may be allowed by the Court. If any such property does come to the knowledge of the liquidator within a month after the commencement of the winding up the power to disclaim may be exercised within 12 months or such extended time as may be allowed after he has become aware thereof. The Court may, however, before granting leave require notices to be given to persons interested in the property sought to be disclaimed.

The power to disclaim, however, is subject to one restriction. Where an application in writing has been made to the liquidator by any person interested in the property requiring him to decide whether he will or will not disclaim and the liquidator does not, within 28 days after the receipt of the application or such further time as may be allowed by the Court notify to the applicant his intention to apply to the Court for leave to disclaim, the company shall be deemed to have adopted the property. In case of a contract, the liquidator instead of notifying any such intention should definitely disclaim the same within the like period; otherwise the company shall be deemed to have adopted it.

Application to rescind contracts

As against the liquidator's power to disclaim, even any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company may apply to the Court for proper reliefs. The Court in such a case may make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, and any damages payable under such order to any person may be proved by him as a debt in the winding up.

Vesting order

In the event of any disclaimer under this section the Court may, on an application by any person interested in the disclaimed property who is under any liability not discharged by the Act in respect of any such property, make an order for the vesting of the property in or delivery thereof to any person entitled thereto or by way of compensation. Such order itself would be enough to vest the property in the person specified without any assignment or conveyance for the purpose.

Where the disclaimed property is of leasehold nature the Court shall not make such vesting order in favour of a sub-lessee or mortgagee of the company except upon the terms that he shall be subject

to the same liabilities and obligations as those to which the company was subject under the lease at the date of the winding-up or that he shall be subject only to the same liabilities and obligations as if the lease had been assigned to that person at the date. Where the terms of the vesting order are not accepted by the under-lessee or the mortgagee, he shall be excluded from all interest in and security upon the property. The Court, in that event, may make the vesting order in favour of any person liable either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed from all estates, incumbrances and interests created therein by the company.

If as a result of a disclaimer any person is in any respect injured, he shall be deemed to be a creditor of the company to the amount of the injury and may prove it as a debt in the winding up.

LIQUIDATOR'S DUTY AS TO PENDING WINDING UP

S 244 of the Act imposes a duty upon a liquidator in every kind of winding-up to file in Court or with the Registrar, as the case may be, a statement in the prescribed form with respect to the proceedings of the liquidation once in each year and at intervals of not more than 12 months if the winding-up has not concluded in a year. Where such statement is filed in Court a copy thereof should also simultaneously be filed with the Registrar. The statement will be open to inspection by any creditor or contributory of the company at all reasonable times on the payment of the prescribed fee. He may also get a copy of the statement or an extract therefrom, if desired.

LIQUIDATOR'S DUTY AS TO PAYMENT INTO BANK

Another duty of a common law applicable to a liquidator in any winding-up is imposed by the new s 244A namely, that he should open a special banking account and pay all sums received by him as liquidator into such account.

As regards a liquidator in a compulsory winding-up, however, he is required to pay such money into a scheduled bank as defined in s 2(e) of the Reserve Bank of India Act 1934 unless he is otherwise ordered by the Court for reasons of advantage to the creditors or contributories. In any case he cannot retain with himself any sum exceeding Rs 500 or such other amount as the Court may authorise for more than 10 days. If he does so retain it, he shall unless a satisfactory explanation is tendered pay interest on the amount so retained in excess at the rate of 20 per cent per annum and shall further be liable to disallowance of all or such part of his remuneration as the Court may think fit. He may also be removed from his office by the Court and shall be liable to pay any expenses occasioned by reason of his default.

LIQUIDATOR'S DUTY AS TO UNCLAIMED DIVIDENDS, ETC

There has been imposed on a liquidator yet another duty by s 244B which was inserted by Act XXXVI of 1940 and it relates to how he must deal with unclaimed dividends and undistributed profits during the winding-up and on the dissolution of the company. The first sub-section of this section provides that, if the liquidator has in his hands or control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they became payable or refundable he shall forthwith pay that money into the Reserve Bank of India to the credit of the Companies Liquidation Account. It also provides that he shall similarly pay into that account any money representing unclaimed dividends or undistributed assets in his hand at the date of the dissolution of the company. The receipt of the Reserve Bank of India for the money so paid shall be an effectual discharge of the liquidator in respect thereof as provided by sub-section (3). It may be noticed, however, that where the company is being wound up by the Court, the liquidator under the preceding section 244A is required to pay all moneys received by him as such into a scheduled bank and sub-section (4) of this new s 244B therefore provides that in such a case the liquidator shall make the payment into the Companies Liquidation Account by transfer from the account in such bank. Where the company is wound up voluntarily or subject to the supervision of the Court the same sub-section provides that the liquidator shall when filing a statement in pursuance of sub-section (1) of s 244B regarding proceedings in liquidation noticed above, indicate the sum of money which is payable to the Reserve Bank of India as unclaimed dividends or undistributed profit and which he has had in his hands for six months preceding the date to which the statement is brought down and pay that sum into the Companies Liquidation Account within 14 days of the date of filing that statement. Sub-section (2) of this new section requires the liquidator when making any such payment to furnish to such officer as the Central Government may appoint in that behalf a statement in the prescribed form setting forth the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto.

It is not to be assumed, however, that the persons entitled to participate in the sums so paid into the Companies Liquidation Account have lost their right for ever. Sub-section (5) of the section on the contrary, leave liberty to such persons to apply to the Court for an order for payment of any of these sums due to them, and the Court, after calling upon such officer as the Central Govern-

ment may appoint in that behalf to show cause within one month from the date of the service of the notice why the order should not be made and hearing his objections, if any, may make the necessary order if it is satisfied about their claim.

The next sub-section provides for a further disposition of the sums paid into the Companies Liquidation Account after they have remained unclaimed for a period of fifteen years. It says that the sums shall then be transferred to the general revenue account of the Central Government subject, of course, to any claim that may be allowed under the foregoing sub-section as if such transfer had not been made.

Sub-section (7) enacts a similar penalty, in case of default of the liquidator in paying into the Companies Liquidation Account any money as required by sub-section (1) to the one on his failure to deposit in the banking account such sums as he is required to do under s. 244A already referred to

Lastly, in sub-sec. (8) of the section it is stated that nothing in the section shall apply in relation to companies with objects confined to a single Province which are not trading corporations.

WINDING UP OF UNREGISTERED COMPANIES

It is not every company which is not registered under the present Act which may be wound up. S. 270 defines what an unregistered company means in so far as the Act authorizes such company to be wound up. It says that such company shall include any partnership, association or company consisting of more than seven persons save and except a railway company incorporated by an act of Parliament or by an Indian law or a company registered under the Indian Companies Act of 1866 or any act repealed thereby or under the Indian Companies Act of 1882 or under this Act

It may be noted that the section makes no reference to a foreign company which, though carrying on business in British India, is not registered under the Act. Still, as the section specifies any partnership, association or company irrespective of its domicile, it would be correct to include a foreign company in the expression 'unregistered company' if it consists of more than seven members. In that view of the matter, if a foreign company consists of seven or less than seven members, it cannot be wound up in British India though it may be a registered company in the country of its domicile. Such a restriction led to a number of hardships which were only recently perceived in England and, therefore, it was provided in s. 337 of the Act of 1929 that the provisions as to the composition of the company shall not apply to a foreign company. Cl. (3) of that section is in these terms:

"A partnership, association or company which consist of less than eight members and is not a foreign partnership, association or company"

The clause is stated to be one of the exceptions of the definition of 'an unregistered company'

It may be noted that prior to the removal of the restriction as regards foreign companies, it was held under s 199 of the Act of 1862 that an unregistered company could not be wound up unless there were more than seven members. In *re Bowling and Welby's contract*, (1895) 1 Ch 663

S 270 of the Indian Act is undoubtedly based on s 267 of the English Act of 1908. But this latter section did not improve the situation in this behalf. S 199 of the Act of 1862 and s 267 of the Act of 1908 corresponded to each other and therefore the position of a foreign company consisting of seven or less than seven members under the former remained unaltered under the latter. Consequently the same position would also be maintained under s 270 of the Indian Act. This view is supported by a decision of the Rangoon High Court in *V. L. R. M. Chettyar Punn v. J. Hormusji*, 8 Rang 658.

In a case decided by the Bombay High Court however, it has been held that an unregistered foreign company even though not consisting of more than seven members may be ordered to be wound up under ss 270 and 271 if it has an office and is carrying on business in British India. In *re Strauss & Co Ltd* 38 Bom L R 1080. Rangnekar J who decided that case observed on the authorities that were cited in support of the view aforesaid that he was unable to hold that they were conclusive of the question he had to determine and referred to the *obiter dictum* of Swinfen Eady J in *Re New York and Continental Line* (1909) 54 S J 117.

In his Lordship's view it presently appeared there was much to be said for the construction of the Act of 1908 which the petitioners set up.

From the judgment it however appears that the decision is based more on s 337 of the English Act of 1929 than upon the interpretation of the word 'include' used in s 270 of the Indian Act. Even the widest interpretation of it, said it, submitted cannot do away with the express condition as regards the number of members provided in the section for any company partnership or association to be liable to be wound up as an unregistered company.

Apart from this conflict of decisions on the point, even the Amendment Act 1936 has not introduced this exception in case of foreign companies in s 270 of the Act. The only amendment that it has made is in s 271 to which a new clause based upon sub-sec (2) of s 337 of the English Act 1929 is added stating that a foreign company carrying on business in British India may be wound up as an unregistered company on its ceasing to carry on such business,

notwithstanding that it has been dissolved or otherwise ceased to exist under the law of its domicile. This provision, it is submitted, does not override the provisions of s. 270 which has for its purpose only the defining of an 'unregistered company.' If the legislature had intended otherwise, they could have either redrafted s. 270 in terms of s. 337 of the English Act of 1929 or included a foreign company in the definition of an 'unregistered company' irrespective of the number of its members or in any other manner whatsoever.

It may be noted that the number of members for the purpose of s. 270 is to be counted as on the date of the petition for winding up. Past members cannot be included in such calculation. In *re Bowling and Welby's contract*, and *Weldy's contract*, (*supra*).

Can an Illegal Association be wound up?

The subject of an illegal association has been treated in the first lecture and cases have also been cited showing whether or not an illegal association could be ordered to be dissolved. It appears from those cases, however, that s. 270 of the Act has not been referred to in this connection in any of them. It may, therefore, be interesting to consider whether any company, association or partnership which is illegal under s. 4 of the Act would not none the less be liable to be wound up under s. 270 as an 'unregistered company.' If it could be successfully contended that such company, association or partnership is wholly outside all the provisions of the Act and, therefore, s. 270 cannot apply to it, the scope of s. 270, would be simply restricted to a company, association or partnership consisting of more than seven members and less than eleven, where the business is of banking, and less than twenty-one where the business is of any other kind. It is debatable whether the section could be narrowed down in that manner when it does not contain the slightest indication to justify that course. There is so far no judicial pronouncement in favour of one view or the other.

Mode of winding up

Now, such unregistered company cannot be wound up under the Act either voluntarily or under the supervision of the Court. It can only be wound up compulsorily, and nearly all the provisions of the Act in regard to compulsory winding up apply to the winding up of such unregistered company, subject to the following exceptions and additions thereto:

(1) An unregistered company for the purpose of determining the Court having jurisdiction in respect of the winding up thereof shall be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business in more than one province, in each of such provinces, and the principal place of business situate in that province in which proceedings

are being instituted shall be deemed to be the registered office of the company;

(2) The circumstances under which an unregistered company may be wound up are: (a) if the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs; (b) if the company is unable to pay its debts; or (c) if the Court is of the opinion that it is just and equitable that the company should be wound up:

(3) Such company shall be deemed to be unable to pay its debts (a) if a creditor claiming a sum exceeding a sum of Rs. 500 has served on the company a demand under his hand for the payment thereof, and the company has for three weeks thereafter failed to pay it or to secure or compound for it to the satisfaction of the creditor; (b) if any suit or legal proceeding has been instituted against any member for any debt due from the company or from him in his character of a member, and notice in writing of the institution thereof having been served on the company, the company has not within ten days thereafter paid, secured or compounded for the said debt, or indemnified the defendant against all costs, damages and expenses to be incurred by him by reason of the same; (c) if execution or other process issued on any decree or order against the company or any member thereof is returned unsatisfied; and (d) if it is otherwise proved to the Court that the Company is unable to pay its debts. (S. 271).

In the event of an unregistered company being wound up under the aforesaid provisions, every person who is liable to pay or contribute to the payment of any debt or liability of the company or for the adjustment of the rights of the members *inter se* or of the payment of costs, charges and expenses of winding up shall be deemed to be a contributory. In the event of any contributory dying or being adjudged insolvent, the provisions of the Act in that behalf shall apply. (S. 272). Similarly, after the presentation of a petition for winding up and before the making of the order thereon, the Court may stay all suits and proceedings against the company or any of its members on the application of a creditor of the company, and after the order is made no suit or proceeding shall be commenced or proceeded with against any contributory of the company except by leave of the Court and subject to such terms as the Court may impose. (Ss. 273 and 274).

If the unregistered company has no power to sue or be sued in a common name, or if for any reason it appears expedient, the Court may order all or any of the properties, actionable claims, and obligations of the company to vest in the official liquidator in his official capacity, subject to any indemnity such liquidator may be ordered to give. Thereupon, the liquidator may, according to the directions

of the Court, bring or defend in his official name any suit or other legal proceeding relating to the property, or necessary to be brought or defended for the purpose of effectually winding up the company and recovering its property. (S. 275). The next section provides that the aforesaid provisions shall be in addition to, and not in restriction of any provisions contained in the Act with respect to winding up of companies by the Court and the Court or the official liquidator may exercise any powers or do any acts in case of unregistered companies which may be exercised or done by it or him in winding up companies formed and registered under the Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act and then only to the extent provided by the Act.

DEFUNCT COMPANIES

There may be cases where a company is not legally dissolved when it ought to be so dissolved. In such cases, the name of the company continues on the register of companies in the Registrar's office for no purpose whatever. As a matter of fact, it seems to be the intention of the legislature that the register of companies must contain names of such companies which are actually doing business in pursuance of their memorandum of association. And, therefore, the Act confers a power on the Registrar of Companies to strike the name of a company off his register when it appears to him that it is not in operation, or, where it is being wound up, he finds reason to believe that no liquidator is acting or, in spite of the affairs of the company being completely wound up, no returns have been made by the liquidator as required by the Act for a period of six consecutive months after notice demanding the returns has been sent by post to the company or the liquidator at his last known place of business. (S. 247).

The section also lays down the steps which the Registrar should take in such cases. Where he has a reasonable cause to believe that a company is not in operation, he shall send to the company by post a letter inquiring whether it is in operation. If he does not, within one month of sending the letter, receive any answer thereto, he shall within 14 days after the expiration of the month send to the company by post a registered letter referring to the first letter and stating that no answer thereto has been received, and that if an answer is not received to the second letter within a month from the date thereof, a notice will be published in the local *Official Gazette* with a view to striking the name of the company off the register. If the Registrar receives an answer stating that the company is not in operation or if no answer is received within one month after sending

the second letter, he may publish in the local *Official Gazette* and send to the company by post a notice that on the expiration of three months from the date of the notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company dissolved.

In the two other cases also, namely, where no liquidator is acting, or where no returns are made by the liquidator, the Registrar may publish in the local *Official Gazette* and send to the company a similar notice. On the expiration of the time mentioned in such notice, the Registrar may, unless cause is shown to the contrary, strike its name off the register and shall publish notice thereof in the local *Official Gazette*; and on such publication the company shall be dissolved provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

If the company or any member or creditor thereof feels aggrieved by the removal of the company's name from the register, the Court may, on the application of such aggrieved party, order the name of the company to be restored to the register, if it is satisfied that the company was in operation at the time of striking off its name or that otherwise it is just and proper that it should be restored to the register, and make such provisions as may seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

THE INDIAN COMPANIES' ACT

(VII of 1913)

[27 March, 1913.]

An Act to consolidate and amend the law relating to Trading Companies and other Associations.

WHEREAS it is expedient to consolidate and amend the law relating to Trading Companies and other Associations; It is hereby enacted as follows:—

PART I

PRELIMINARY.

1. Short title, commencement and extent (1) This Act may be called the Indian Companies Act, 1913.

(2) It shall come into force on the first day of April, 1914, and

(3) It extends to the whole of British India including British Baluchistan and the Santhal Parganas.

2. Definitions. (1) In this Act unless there is anything repugnant in the subject or context,—

(1) "articles" means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B in the Schedule annexed to Act No XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act

(2) "company" means a company formed and registered under this Act or an existing company:

(3) "the Court" means the Court having jurisdiction under this Act:

(4) "debenture" includes debenture stock:

(5) "director" includes any person occupying the position of a director by whatever name called:

(6) "District Court" means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction:

(7) "existing company" means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882:

(8) "Insurance company" means a company that carries on the business of insurance either solely or in common with any other business or businesses:

(9) "manager" means a person who subject to the control and direction of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position

of a manager by whatever name called and whether under a contract of service or not:

(9A) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever named called.

Explanation If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act

(10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act.

(11) "officer" includes any director, managing agent, manager or secretary but save in sections 235, 236 and 237, does not include an auditor

(12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court, and, as respects the other provisions of this Act prescribed by the Central Government

(13) "private company" means a company which by its articles—

(a) restricts the right to transfer the shares, if any and

(b) limits the number of its members to fifty not including persons who are in the employment of the company and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member

(13A) "public company" means a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act, repealed thereby, which is not a private company

(14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed

(15) "the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies:

(16) "share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied:

(17) "trading corporation" means a trading corporation within the meaning of Item 33 in List I in the Seventh Schedule to the Government of India Act, 1935

(2) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

(a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent of the voting power in that other company, or

(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company, that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression 'subsidiary company' in this Act means a company in the case of which the conditions of this subsection are satisfied and includes a subsidiary company of such company

Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held

2A Provisions as to companies registered in Burma or Aden before separation from India—Notwithstanding anything in the last preceding section, a company which was immediately before the separation of Burma and Aden from India a company as defined by the said section, being a company the registered office whereof is in Burma or Aden—

(a) shall be deemed for the purposes of this Act to be a company registered and incorporated outside British India and

(b) shall not unless the subject-matter or context so requires, be included in the expressions 'company' existing company 'public company', and 'private company'

Provided that—

(i) for the purposes of section 277 of this Act such a company shall, for a period of six months from the separation, be deemed to be a company incorporated and registered in British India,

(ii) the separation of Burma and Aden from India shall not render valid any mortgage or charge which, immediately before the date, was void against the liquidator or creditors of such a company

3. Jurisdiction of the Courts (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate

Provided that the Central Government may by notification in the official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district

(2) For the purpose of jurisdiction to wind up companies the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court

PART II.

CONSTITUTION AND INCORPORATION.

4. Prohibition of partnership exceeding certain number. (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian law or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian law or of Royal Charter or Letters Patent.

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business.

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees.

P. 7

MEMORANDUM OF ASSOCIATION.

5. Mode of forming incorporated company. Any seven or more persons (or, where the company to be formed will be private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

(i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or

(ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or

(iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

P. 19

6. Memorandum of company limited by shares. In the case of a company limited by shares—

(1) the memorandum shall state—

(i) the name of the company, with "Limited" as the last word in its name;

P. 19

(ii) the province in which the registered office of the company is to be situate;

P. 21

(iii) the objects of the company, and, except in the case of trading corporations, the territories to which they extend; P. 21

(iv) that the liability of the members is limited; P. 25

(v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount; P. 25

(2) no subscriber of the memorandum shall take less than one share; P. 26

(3) each subscriber shall write opposite to his name the number of shares he takes. P. 26

7. Memorandum of company limited by guarantee. In the case of a company limited by guarantee—

(1) the memorandum shall state—

(i) the name of the company, with "Limited" as the last word in its name,

(iii) the objects of the company, and except in the case of trading corporations, the territories to which they extend;

(iv) that the liability of the members is limited

(v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount P. 19

(2) If the company has a share capital—

(i) the memorandum shall also state the amount of share capital with which the Company proposes to be registered and the division thereof exceeding a specified amount P. 19

(ii) no subscriber of the memorandum shall take less than one share;

(iii) each subscriber shall write opposite to his name the number of shares he takes P. 26

8. Memorandum of unlimited company. In the case of an unlimited company—

(1) the memorandum shall state—

(i) the name of the company,

(ii) the province in which the registered office of the company is to be situate,

(iii) the objects of the company, and, except in the case of trading corporations, the territories to which they extend; P. 19

(2) if the company has a share capital—

(i) no subscriber of the memorandum shall take less than one share;

(ii) each subscriber shall write opposite to his name the number of shares he takes. P. 26

9. Printing and signature of memorandum The memorandum shall—

- (a) be printed
- (b) be divided into paragraphs numbered consecutively and
- (c) be signed by each subscriber (who shall add his address and description) in the presence of at least one witness who shall attest the signature

P 19

10 Restriction on alteration of memorandum A company shall not alter the condition contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this act

Provided that any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company shall not be deemed to be such condition

P 18

11 Name of company and change of name (1) A company shall not be registered by a name identical with that by which a company in existence is already registered or so nearly resembling that name as to be calculated to deceive except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires

(2) If a company through inadvertence or otherwise is without such consent as aforesaid registered by a name identical with that by which a company in existence is previously registered or so nearly resembling it as to be calculated to deceive the first mentioned company may with the sanction of the registrar change its name

(3) Except with the previous consent in writing of the Central Government no company shall be registered by a name which

(a) contains any of the following words namely Crown Emperor Empire Empress Federal Imperial King Queen Royal State Reserve Bank Bank of Bengal Bank of Madras Bank of Bombay or any word which suggest or is calculated to suggest the patronage of His Majesty's Government or any department thereof or

(b) contains the word Municipal or Chartered or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act

(4) Any company may, by special resolution and subject to the approval of the Central Government signified in writing change its name

(5) Where a company changes its name the registrar shall enter the new name on the register in place of the former name and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate the change of name shall be complete

(6) The change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company and any legal proceeding, that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name

P 19

12. Alteration of Memorandum. (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) to enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the memorandum; or
- (f) to sell or dispose of the whole or any part of the undertaking of the company; or
- (g) to amalgamate with any other company or body of persons

(2) The alterations shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b) that with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section. P. 26

13. Power of Court when confirming alteration. The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper. P. 27

14. Exercise of discretion by Court. The Court shall, in exercising its discretion under sections 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company may be expended in any such purchase. P. 27

15 Procedure on confirmation of the alteration. (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and

the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

(2) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such registrars shall register the same and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office.

(3) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper. P. 27

16. *Effect of failure to register within three months.* No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void.

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month. P. 27

ARTICLES OF ASSOCIATION

17. *Registration of articles.* (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule, and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 78, 79, 80, 81 and 82, regulation 95, regulation 97, regulation 105, regulation 107 and regulations 112, 113, 114, 115, and 116 contained in that Table:

Provided that regulations 78, 79, 80, 81, and 82 shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company:

Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall determine otherwise.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration. P. 29

18. Application of Table A. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A, in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles. P. 29

19. Form and signature of articles. Articles shall—

(a) be printed;

(b) be divided into paragraphs numbered consecutively; and

(c) be signed by each subscriber of the memorandum (who shall add his address and description) of association in the presence of at least one witness who must attest the signature. P. 30

20. Alteration of articles by special resolution. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares notwithstanding that those regulations are contained in the memorandum. P. 34

20A. Effect of alteration in memorandum or articles. Notwithstanding anything in the memorandum of articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company:

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby. P. 34

GENERAL PROVISIONS.

21. Effect of memorandum and articles. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

P. 30

22. Registration of memorandum and articles. The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

P. 45

23. Effect of registration. (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

P. 45

24. Conclusiveness of certificate of incorporation. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance

P. 46

25. Copies of memorandum and articles to be given to members. (1) Every company shall send to every member, at his request and within fourteen days thereof on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees.

25A. Alteration of memorandum or articles to be noticed in every copy. (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding ten rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.

26. Power to dispense with "Limited" in name of charitable and other companies. (1) Where it is proved to the satisfaction of the Central Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects and to prohibit the payment of any dividend to its members, the Central Government may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited", to its name, and the association may be registered accordingly.

(2) A license by the Central Government under this section may be granted on such conditions and subject to such regulations as the Central Government thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the Central Government so directs, be inserted in the memorandum and articles, or in one of those documents

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members to the registrar.

(4) A license under this section may at any time be revoked by the Central Government, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section

Provided that, before a license is so revoked, the Central Government shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation

P. 20

COMPANIES LIMITED BY GUARANTEE

27 Provision as to companies limited by guarantee. (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company, into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.)

PART III

SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS

DISTRIBUTION OF SHARE CAPITAL.

28. Nature of shares. (1) The shares or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company. P. 91

(2) Each share in a company having a share capital shall be distinguished by its appropriate number. P. 84

29. Certificate of shares or stock. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the share or stock therein specified. P. 91

30. Definition of "Member." (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. P. 62

31. Register of members. (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

(i) the names and addresses, and the occupations, if any, of the members and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(ii) the date at which each person was entered in the register as a member;

(iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. P. 70

31A. Index of members of company. (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index.

(2)* The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(3) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees. P. 71

32. Annual list of members and summary. (1) Every company having a share capital shall within eighteen months from its incorporation and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list shall state the names, addresses and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(a) the amount of the share capital of the company, and the number of the shares into which it is divided;

(b) the number of shares taken from the commencement of the company up to the date of the return;

(c) the amount called up on each share;

(d) the total amount of calls received;

(e) the total amount of calls unpaid;

(f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any shares or debentures, since the date of the last return or so much thereof as has not been written off at the date of the return;

(g) the total number of shares forfeited;

(h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return;

(i) the total amount of share-warrants issued and surrendered respectively since the date of the last return;

(k) the number of shares or amount of stock comprised in each share-warrant;

(1) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are the managers or managing agents of the company, and the changes in the personnel of the directors, managers and managing agents since the last return together with the dates on which they took place; and

(m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within twenty-one

days after the day of the first or only ordinary general meeting in year, and the company shall forthwith file with the registrar a certificate signed by a director or by the manager or the secretary of the company together with a certificate from such director manager or secretary that the list and summary state the facts as they stood on the day aforesaid

(4) A private company shall send with the annual return required by sub-section (1) a certificate signed by a director or other officer of the company that the company has not since the date of the last return or in the case of a first return since the date of the incorporation of the company issued any invitation to the public to subscribe for any shares or debentures of the company and where the annual return discloses the fact that the number of members of the company exceeds fifty also a certificate so signed that the excess consists wholly of persons who under sub clause (b) of clause 13 of sub-section (1) of section 2 are not to be included in reckoning the number of fifty

(5) If a company make default in complying with the requirements of this section it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty

P 73

33 Trusts not to be entered on register No notice of any trust expressed implied or constructive shall be entered on the register or be receivable by the registrar

P 69

34 Transfer of shares (1) An application for the registration of the transfer of shares in a company may be made either by the transferor or the transferee provided that where such application is made by the transferor no registration shall in the case of partly paid shares be effected unless the company gives notice of the application to the transferee and subject to the provisions of sub-section (7) the company shall unless objection is made by the transferee within two weeks from the date of receipt of the notice enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee

(2) For the purposes of sub-section (1) notice to the transferee shall be deemed to have been duly given if despatched by prepaid post to the transferee at the address given in the instrument of transfer and shall be deemed to have been delivered in the ordinary course of post

(3) It shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with scrip

Provided that where it is proved to the satisfaction of the directors of the company that an instrument of transfer signed by the transferor and transferee has been lost the company may if the directors think fit on an application in writing made by the transferee and bearing the stamp required by an instrument of transfer register the transfer on such terms as to indemnity as the directors may think fit

(4) If a company refuses to register the transfer of any shares or debentures, the company shall, within two months from the date on which the instrument of transfer was lodged with the company send to the transferee and the transferor notice of the refusal

(5) If default is made in complying with sub-section (4) of this section, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

(6) Nothing in sub-section (3) shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

(7) Nothing in this section shall prejudice any power of the company under its articles to refuse to register the transfer of any shares.

P. 91

35. Transfer by legal representative. A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

36. Inspection of register of members. (1) The register of members, commencing from the date of the registration of the company and the index of members shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one rupee, or such less sum as the company may prescribe, for each inspection. Any such member or other person may make extracts therefrom.

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied and the company shall cause any copy so required by any person to be sent to that person within a period of ten days, exclusive of non-working days and days on which the transfer books of the company are closed, commencing on the day next after the day on which the requirement is received by the company.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal or default continues and the Court may by an order compel an immediate inspection of the register and index or direct that copies required shall be sent to the persons requiring them.

P. 72

37. Power to close register. A company may, on giving seven days' previous notice by advertisement, in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole forty-five days in each year but not exceeding thirty days at a time. P. 72

38. Power of Court to rectify register. (1) If—

(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register:

Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code. P. 72

39. Notice to registrar of rectification of register. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the registrar within a fortnight from the date of the completion of the order. P. 73

40. Register to be evidence. The register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. P. 71

41. Power for company to keep branch register in the United Kingdom. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in the United Kingdom a branch register of members (in this Act called a British register).

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues. P. 71

42. Regulations as to British register. (1) A British register shall be deemed to be part of the company's register of members (in this section called the principal register).

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept.

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register

(4) Subject to the provision of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register, and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register

P. 71

42A. Application of sections 41 and 42 to Burma. (1) The provisions of sections 41 and 42 shall apply in relation to Burma as they apply in relation to the United Kingdom

(2) In the application of the said provisions to Burma, references to a British register shall be construed as references to a Burma register

43. Issue of share-warrants to bearer. (1) A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant.

(2) Nothing in this section shall apply to a private company. P. 96

44. Effect of share-warrant. A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant. P. 96

45. Registration of name of bearer of share-warrant. The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled. P. 96

46. Position of bearer of share-warrant. The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full

extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles. P. 96

47. Entries in register when share-warrant issued. (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely:—

- (i) the fact of the issue of the warrant;
- (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number; and
- (iii) the date of the issue of the warrant.

(2) If a company makes default in complying with the requirements of this section it shall be liable to fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty P. 96

48. Surrender of share-warrant. Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members; and, on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a member P. 96

49. Power of company to arrange for different amounts being paid on shares. A company, if so authorised by its articles, may do any one or more of the following things, namely:—

- (1) make arrangements on the issue of shares for a difference between the shareholders in the amount; and times of payment of calls on their shares;
- (2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up;
- (3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others. P. 98

50. Power of company limited by shares to alter its share capital. (1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;
- (c) convert all or any of its paid-up shares into stock and reconvert that stock into paid-up shares of any denomination;
- (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any,

unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled

(2) The power conferred by this section must be exercised by the company in general meeting

(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

(4) The company shall file with the registrar notice of the exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof

P 78

51. Notice to registrar of consolidation of share capital, conversion of shares into stock, etc. (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion, file notice with the registrar of the same, specifying the shares consolidated and divided, or converted, or the stock re-converted

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty

P 79

52. Effect of conversion of shares into stock. Where a company having a share capital has converted any of its shares into stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock, and the register of members of the company, and the list of members to be filed with the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act

P 84

53. Notice of increase of share capital or of members. (1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase

(2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions (if any) subject to which the new shares are to be issued.

(3) If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. P. 79

REDUCTION OF SHARE CAPITAL

54A. Restrictions on purchase by company or loans by company for purchase of its own shares. (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by sections 55 to 66.

(2) No company limited by shares other than a private company, not being a subsidiary company of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company:

Provided that nothing in this section shall be taken to prohibit, where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business.

(3) If a company acts in contravention of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees.

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under section 105B. P. 82

55. Reduction of share capital. (1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act called a resolution for reducing share capital. P. 80

56. Application to Court for confirming order. Where a Company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction. P. 80

57. Addition to name of company of "and reduced." On and from the passing by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any li-

bility in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the making of the order confirming the reduction, the company shall add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced."

P. 81

58. Objections by creditors and settlement of list of objecting creditors. (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital, or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

P. 80

59. Power to dispense with consent of creditor on security being given for his debt. Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating as the Court may direct, the following amount (that is to say),—

(i) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

P. 80

60. Order confirming reduction. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

P. 80

61. Registration of order and minute of reduction. (1) The registrar on production to him of an order of the Court confirming the reduc-

tion of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute

(2) On the registration and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect

(3) Notice of the registration shall be published in such manner as the Court may direct

(4) The registrar shall certify under his hand the registration of the order and minute and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with and that the share capital of the company is such as is stated in the minute

P 81

62 Minute to form part of memorandum (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company and shall be valid and alterable as if it had been originally contained therein and shall be embodied in every copy of the memorandum issued after its registration

(2) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty

63 Liability of members in respect of reduced shares (1) A member of the company past or present shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid or (as the case may be) the reduced amount if any which is to be deemed to have been paid on the share and the amount of the share as fixed by the minute

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entitled on the part of creditors and, after the reduction, the company is unable within the meaning of the provisions of this Act with respect to winding up by the Court to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration, and

(ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up

(2) Nothing in this section shall affect the rights of the contributors among themselves. P. 81

84. Penalty on concealment of name of creditor. If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, every such officer shall be punishable with imprisonment which may extend to one year or with fine, or with both

85. Publication of reasons for reduction. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction. P. 80

86. Increase and reduction of share capital in case of a company limited by guarantee having a share capital. A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

VARIATION OF SHAREHOLDERS' RIGHTS

66A. Rights of holders of special classes of shares. (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent, of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made the variation shall not have effect unless and until it is confirmed by the Court.

(2) An application under this section must be made within fourteen days after the date on which the consent was given, or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall within fifteen days after the service on the company of any order made on any such application forward a copy of

the order to the registrar and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(6) The expression 'variation' in this section includes 'abrogation' and the expression 'varied' shall be construed accordingly. P. 83

REGISTRATION OF UNLIMITED COMPANY AS LIMITED

67. Registration of unlimited company as limited. (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that Part.

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act. P. 175

68. Power of unlimited company to provide for reserve share capital on re-registration. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up;

(b) provided that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up. P. 175

RESERVE LIABILITY OF LIMITED COMPANY

69. Reserve liability of limited company. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for purposes aforesaid. P. 78

UNLIMITED LIABILITY OF DIRECTORS

70. Limited company may have directors with unlimited liability. (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default. P. 129

71. Special resolution of limited company making liability of directors unlimited. (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director

* (2) Upon the passing of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum P. 130

PART IV.

MANAGEMENT AND ADMINISTRATION

OFFICE AND NAME

72. Registered office of company. (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar who shall record the same

(3) The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business. P. 21

73. Publication of name by a limited company. Every limited company—

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters,

and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place,

(b) shall have its name engraved in legible characters on its seal,

(c) shall have its name mentioned in legible English characters in all billheads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company P 20

74. Penalties for non-publication of name. (1) If a limited company does not paint or affix, and keep painted or affixed its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name and for every day during which its name is not so kept painted or affixed, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty

2) If any officer of a limited company, or any person on its behalf uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraved as aforesaid, or issues or authorises the issue of any bill-head, letter paper notice advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company

75. Publication of authorised as well as subscribed and paid-up capital. (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid "

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees

MEETINGS AND PROCEEDINGS

76. Annual general meeting. (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of

the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

P. 137

77. Statutory meeting of Company. (1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting

(2) The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as the statutory report) certified as required by this section to every member of the company.

(3) The statutory report shall be certified by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid,

(c) an abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid on the issue or sale of shares;

(d) the names, addresses and descriptions of the directors, auditors, managing agents and managers, if any, and secretary of the company and the changes, if any, which have occurred since the date of the incorporation;

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification; ,

(f) the extent to which underwriting contracts, if any, have been carried out;

(g) the arrears, if any, due on calls from directors, managing agents and managers; and

(h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager or a partner of the managing agent if the managing agent is a firm or if the managing agent is a private company, a director thereof.

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares

and to the receipts and payments of the company, be certified as correct by the auditors of the company

(5) The director shall cause a copy of the statutory report certified as required by this section to be delivered to the registrar for registration forthwith after the sending thereof to the members of the company

(6) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed

(8) The meeting may adjourn from time to time and at any adjourned meeting any resolution of which notice has been given in accordance with the articles either before or subsequently to the former meeting may be passed, and the adjourned meeting shall have the same powers as an original meeting

(9) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting the Court may, instead of directing that the company be wound up give directions for the statutory report to be filed or a meeting to be held or make such other order as may be just

(10) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees

(11) This section shall not apply to a private company P 136

78. Calling of extraordinary general meeting on requisition. (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid forthwith proceed to call an extraordinary general meeting of the company

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists or a majority of them in value, may themselves call the meeting, but in either case any meeting so-called shall be held within three months from the date of the deposit of the requisition

(4) Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors

(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default

P 138

79. Provisions as to meetings and votes. (1) The following provisions shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat, notwithstanding any provision made in the articles of the company in this behalf —

(a) a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing, but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit,

(b) notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by Table A and for the purpose of this clause the expression Table A means that Table as for the time being in force but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting,

(c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll. Provided that in the case of a private company if not more than seven members are personally present, one member and if more than seven members are personally present two members shall be entitled to demand a poll,

(d) an instrument appointing a proxy if in the form set out in regulation 67 of Table A shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles, and

(e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class

(2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf —

(a) two or more members holding not less than one-tenth of the total share capital paid up or, if the company has not a share capital, not less than five per cent in number of the members of the company may call a meeting,

(b) in the case of a private company two members and in the case of any other company five members personally present shall be a quorum,

(c) any member elected by the members present at a meeting may be chairman thereof,

(d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred

rupees of stock held by him, and in any other case every member shall have one vote

(e) on a poll votes may be given either personally or by proxy,

(f) the instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing or if the appointor is a corporation either under seal or under the hand of an officer or an attorney duly authorised and

(g) a proxy must be a member of the company

(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act the Court may either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called held and conducted in such manner as the Court thinks fit and where any such order is given may give such ancillary or consequential directions as it thinks expedient and any meeting called held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called held and conducted

P 140

80 Representation of companies at meetings of other companies of which they are members. A company which is a member of another company may by resolution of the directors authorise any of its officials or any other person to act as its representative at any meeting of that other company and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company

P 68

81 Extraordinary and special resolutions. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given

Provided that if all the members entitled to attend and vote at any such meeting so agree a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given

(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a declaration of the chairman on a show of hands that the resolution is carried shall unless a poll is demanded be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution

(4) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll may be demanded

(5) In a case where if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct it may,

if the chairman so directs, be taken at the meeting at which it is demanded.

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company or under this Act.

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, or under this Act.

P. 142

82. Registration and copies of special and extraordinary resolutions.

(1) A copy of every special and extraordinary resolution shall, within fifteen days from the passing thereof be printed or typewritten and duly certified under the signature of an officer of the company and filed with the registrar who shall record the same.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

P. 143

83. Minutes of proceedings of general meetings and of its directors.

(1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

(4) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1936, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.

(5) Any member shall at any time after seven days from the meeting be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words

(6) If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to a further fine not exceeding twenty-five rupees for every day during which the default continues

(7) In the case of any such refusal or default the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them

P 145

DIRECTORS

83A Directors obligatory. (1) Every company shall have at least three directors

(2) This section shall not apply to a private company except a private company being a subsidiary company of a public company P 122

83B. Appointment of directors. (1) In default of and subject to any regulations in the articles of a company other than a private company -

(i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed,

(ii) the directors of the company shall be appointed by the members in general meeting and

(iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director

(2) Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section

P 122

84 Restrictions on appointment or advertisement of director. (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the regis-

tration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

(i) signed and filed with the registrar a consent in writing to act as such director, and

(1) save in the case of companies not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any) or taken from the company and paid or agreed to pay for his qualification shares or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) or made and filed with the registrar an affidavit to the effect that a number of shares not less than his qualification (if any), are registered in his name

(2) On the application for registration of the memorandum and articles, (if any) of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented the applicant shall be liable to a fine not exceeding five hundred rupees

(3) This section shall not apply to a private company or a company which was a private company before becoming a public company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business

P 123

85. Qualification of director (1) Without prejudice to the restrictions imposed by section 84 it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment or such shorter time as may be fixed by the articles

(2) If, after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director

P 123

86. Validity of acts of directors The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid

P 123

86A. Ineligibility of bankrupt to act as director. (1) If any person being an undischarged insolvent acts as director or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand rupees or to both

(2) In this section the expression 'company' includes a company incorporated outside British India which has an established place of business within British India

P 124

86B. Assignment of office by directors. If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assign-

ment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company;

Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section;

Provided always that any such alternative or substitute director shall *ipso facto* vacate office if and when the appointor returns to the district in which meetings of the directors are ordinarily held.

Explanation.—For the purposes of the provisos to this section, the presidency-towns of Calcutta and Madras shall be deemed to be part of the 24-Parganas and Chingleput Districts, respectively, and the presidency-town of Bombay shall be deemed to be part of the Bombay Suburban and the Thana districts.

P. 127

36C. Avoidance of provisions relieving liability of directors. Same as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void.

Provided that—

(a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1936, this section shall have effect only on the expiration of a period of six months from that date, and

(b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and

(c) notwithstanding anything in this section, company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 281 of this Act in which relief is granted to him by the Court.

P. 128

36D. Loans of Directors. (1) No company shall make any loan or guarantee any loan made to a director of the company or to a firm of which such director is a partner or to a private company of which such director is a member or director.

(2) In the event of any contravention of sub-section (1) any director of the company who is a party to such contravention shall be punishable with fine which may extend to five hundred rupees, and if default is made

in repayment of the loan or in discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(3) This section shall not apply to a private company (except a private company which is the subsidiary company of a public company) or to a banking company. P. 128

36E. Director not to hold office of profit. No director or firm of which such director is a partner or private company of which such director is a director shall without the consent of the company in general meeting hold any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker:

Provided that nothing herein contained shall apply to a director elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936, in respect of any office of profit under the company held by him at the commencement of the said Act.

Explanation.—For the purposes of this section the office of managing agent shall not be deemed to be an office of profit under the company. P. 128

36F. Sanction of directors necessary for certain contracts. Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936

36G. Removal of directors. (1) The company may by extraordinary resolution remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. A director so removed shall not be reappointed a director by the board of directors.

(2) This section shall not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936. P. 125

36H. Restrictions on powers of directors. The directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company concerned in general meeting—

(a) sell or dispose of the undertaking of the company;

(b) remit any debt due by a director P. 129

36I. Vacation of office of director. (1) The office of a director shall be vacated if—

(a) he fails to obtain within the time specified in sub-section (1) of section 85 or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or

(b) he is found to be of unsound mind by a Court of competent jurisdiction, or

(c) he is adjudged an insolvent, or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or

(e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors, or

(g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan or guarantee from the company in contravention of section 86D, or

(h) he acts in contravention of section 86F.

(2) Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section P. 124

87. Register of directors, managers and managing agents. (1) Every company shall keep at its registered office a register of its directors, managers and managing agents containing with respect to each of them the following particulars, that is to say:—

(a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality and, if that nationality is not the nationality of origin, his nationality of origin and his business occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships;

(b) in the case of a corporation, its corporate name and registered or principal office, and the full name, address and nationality of each of its directors; and

(c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner.

(2) The company shall within the periods respectively mentioned in this sub-section send to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be opened to the inspection of any member of the company without charge and of any other person on payment of one rupee or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees.

(5) In the case of any such refusal, the Court on application made by the person to whom inspection has been refused and upon notice to the company may by order direct an immediate inspection of the register

P. 133

MANAGING AGENTS

87A. Duration of appointment of managing agent. (1) No managing agent shall, after the commencement of the Indian Companies (Amendment) Act, 1936 be appointed to hold office for a term of more than twenty years at a time

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act 1936 shall not continue to hold office after the expiry of twenty years from the commencement of the said Act unless then reappointed thereto or unless he has been reappointed thereto before the expiry of the said twenty years

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall upon such termination be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by the managing agent on behalf of the company subject to existing charges and encumbrances if any

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to the date of such termination from the company are paid

(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company

P. 134

87B. Conditions applicable to managing agents Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company

(a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company remove a managing agent if he is convicted of an offence in relation to the affairs of the company punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure 1898, non-bailable, and for the purposes of this clause, where the managing agent is a firm or company an offence committed by a member of such firm or a director of or an officer holding a general power of attorney from such company shall be deemed to be an offence committed by such firm or company

Provided that a managing agent shall not be liable to be removed under the provisions hereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within thirty days from the date of his conviction or if his conviction is set aside on appeal;

(b) the office of a managing agent shall be vacated if he is adjudged insolvent,

(c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting

Provided that in the case of a managing agent's firm a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing agent's firm. For the purpose of this proviso 'original partners' shall mean, in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act and in the case of managing agents appointed after the commencement of the said Act partners who were partners at the date of the appointment,

(d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company,

(e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice, however to the right of the managing agent to recover any moneys recoverable by the managing agent from the company. Provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management, and

(f) the appointment of a managing agent, the removal of a managing agent and any variation of a managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 86E.

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lieu of prospectus where the terms of the appointment of such managing agent are there set forth. P. 134

87C. Remuneration of managing agent. (1) Where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the managing agent shall be a sum based on a fixed percentage of the net annual profits of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits together with an office allowance to be defined in the agreement of management.

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company.

(3) For the purposes of this section 'net profits' means the profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from any Government or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the under-

taking of the company but without any deduction in respect of income-tax or super-tax, or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund.

(4) This section shall not apply to a private company except a private company which is the subsidiary company of a public company or to any company whose principal business is the business of insurance. P. 136

87D. Loans to managing agents. (1) No company shall make to a managing agent of the company or to any partner of the firm, if the managing agent is a firm, or to any member or director of the private company, if the managing agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent.

(2) Nothing contained in this section shall apply to any credit held by a managing agent in a current account maintained subject to limits previously approved by the board of directors by the company with the managing agent for the purposes of the company's business.

(3) In the event of any contravention of sub-section (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm, or, if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936. P. 135

87E. Loans to or by companies under the same management. (1) No company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936, which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management by the same managing agent, and no company shall after the expiry of six months from the commencement of the said Act except by way of renewal of an existing loan or guarantee given make any loan to or guarantee any loan made to any such company.

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company to or by a subsidiary company thereof or to guarantees given by a company on behalf of a subsidiary company thereof.

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees and shall be jointly and severally

liable for any loss incurred by the company in respect of such loan or guarantee. P. 136

87F. Purchase by company of shares of company under the same managing agent. A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company. P. 137

87G. Restriction on managing agent's powers of management. A managing agent shall not exercise in respect of any company of which he is a managing agent a power to issue debentures or, except with the authority of the directors, and within the limits fixed by them, a power to invest the funds of the company, and any delegation of any such power by a company to a managing agent shall be void. P. 136

87H. Managing agent not to engage in business competing with the business of managed company. A managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company. P. 136

87I. Limit on number of directors appointed by managing agent. Notwithstanding anything contained in the articles of a company other than a private company the directors, if any, appointed by the managing agent shall not exceed in number one-third of the whole number of directors. P. 122

CONTRACTS.

88. Form of contracts. (1) Contracts on behalf of a company may be made as follows (that is to say):—

(1) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be. P. 155

89. Bills of exchange and promissory notes. A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of the company by any person acting under its authority, express or implied. P. 155

90. Execution of deeds. A company may, by writing under its common seal, empower any person, either generally or in respect of any spe-

cified matters as its attorney, to execute deeds on its behalf in any place either in or outside British India; and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal. P. 156

91. Power for company to have official seal for use abroad. (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of revocation or determination of the agent's authority has been given to the person dealing with him

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company P. 156

^{A.P.} 91A. Disclosure of interest by director. (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement:

Provided that a general notice that a director is a director or a member of any specified company or is a member of any specified firm, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees. P. 156

91B. Prohibition of voting by interested director. (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested nor shall his presence count for the purpose of forming a quorum at the time of any such vote; and if he does so vote, his vote shall not be counted:

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or anyone or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) This section shall not apply to a private company.

Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company. P. 157

91C. Disclosure to members in case of contract appointing a manager.

(1) Where a company enters into a contract for the appointment of a manager or managing agent of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall, within twenty-one days from the date of entering into the contract or the varying of the contract, send an abstract of the terms of such contract or variation as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member; and the contract shall be open to the inspection of any member at the registered office of the company.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. P. 157

91D. Contracts by agents of company in which company is undisclosed principal. (1) Every manager or other agent of a company other than a private company not being the subsidiary company of a public company who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company and send copies to the directors, and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section—

(a) the contract shall, at the option of the company, be void as against the company; and

(b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees. P. 156

PROSPECTUS

92. Filing of prospectus. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date, shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed. P. 54

93. Specific requirements as to particulars of prospectus. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

(a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively, and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption; and

(b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors, and

(c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers and managing agents or proposed managing agents (if any) and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them; and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within

the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued, and

(ee) where any issue of shares or debentures is underwritten, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations; and

(f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor. Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors, and

(ff) where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus; and

(g) the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill, and

(h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents. Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

(i) the amount or estimated amount of preliminary expenses; and

(k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment, and

(l) the dates of, and parties to, every material contract including contracts relating to the acquisition of property to which clause (f) applies, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried

on or intended to be carried on by the company, or to any contract (except a contract appointing or fixing the remuneration of a managing director or managing agent) entered into more than two years before the date of issue of the prospectus; and

(m) the names and addresses of the auditors (if any) of the company; and

(n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such director consists in being a partner in a firm, the nature and extent of the interest of the firm with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion of the company; and

(o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively; and

(p) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions; and

(q) where any part of the sums required for the matters set out in sub-section (2) of section 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof.

(1A) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1), namely:—

(i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact;

(ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus:

Provided that if in the case of a company which has been carrying on business for less than three years the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years.

(1B) The statement referred to in clause ((ff) of subsection (1) and the report referred to in sub-section (1A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business

Provided that the said requirements except the requirement as to the amount or estimated amount of preliminary expenses, shall apply to a prospectus filed in pursuance of section 154.

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

P. 49

94. Meaning of "vendor" in section 93. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(a) the purchase-money is not fully paid at the date of issue of the prospectus; or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

P. 50

95. Application of section 93 to the case of property taken on lease. Where any of the property to be acquired by the company is to be taken

on lease, section 93 shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

P. 50

96. Invalidity of certain conditions as to waiver or notice. (1) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void

(2) It shall not be lawful to issue any form of application for the shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of section 93

Provided that this sub-section shall not apply if it is shown that the form of application was issued either--

(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures or

(b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be liable to a fine not exceeding five hundred rupees P. 53

97. Saving certain cases of non-compliance with section 93. (1) If a prospectus is issued which does not comply with the provisions of section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirements of section 93 is filed

(2) In the event of non-compliance with or contravention of any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention if he proves that--

(a) as regards any matter not disclosed, he was not cognisant thereof; or

(b) the non-compliance or contravention arose from an honest mistake of fact on his part, or

(c) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused

Provided that, in the event of non-compliance with or contravention of the requirements contained in clause (n) of sub-section (1) of section 93, no such director or other person shall incur any liability in respect of the non-compliance or contravention unless it be proved that he had knowledge of the matters not disclosed ,

P. 58

98. Obligations of companies where no prospectus is issued. (1) A company which does not issue a prospectus on or with reference to its

formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the form marked I in the Second Schedule.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital) P. 54

98A. Document offering shares or debentures for sale to be deemed a prospectus. (1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidence that an allotment of or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot, or

(b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received

(3) Section 87 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 93 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus,—

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and

(b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign, by his agent authorised in writing. P. 52

99. Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus. A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

P. 61

100. Liability for statements in prospectus. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true;

(b) With respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation. Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement report or valuation was competent to make it, and

(c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent; or

(iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further

capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, or his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

(a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company;

(b) the expression "expert" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.

P. 59

ALLOTMENT

101. Restriction as to allotment. (1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum of at least five per cent. thereof has been paid to or received in cash by the company.

(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely:—

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company;

- (c) the repayment of any money borrowed by the company in respect of any of the foregoing matters, and
- (d) working capital.

(2A) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.

(2B) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Reserve Bank of India Act, 1934, until returned in accordance with the provisions of sub-section (4) or until the certificate to commence business is obtained under section 103.

(2C) In the event of any contravention of the provisions of sub-section (2B) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees.

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and eighty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred and ninety days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent per annum from the expiration of the one hundred and ninetieth day; Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash; has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

P. 85

102. Effect of irregular allotment. (1) An allotment made by a company to an applicant in contravention of the provisions of section

98 or section 101 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 98 or section 101 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby. Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of allotment.

P. 87

103 Restrictions on commencement of business. (1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription, and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash, and

(c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with, and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be

liable to a fine not exceeding five hundred rupees for every day during which the contravention continues

(6) Nothing in this section shall apply to a private company or to a company registered before the commencement of this Act which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares, to a company limited by guarantee and not having a share capital

P 47

104 Return as to allotments (1) Whenever a company having a share capital makes any allotment of its shares the company shall within one month thereafter,—

(a) file with the registrar a return of the allotments stating the number and nominal amount of the shares comprised in the allotment, the names addresses and descriptions of the allottees and the amount (if any) paid or due and payable on each share and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale or for service, or other consideration in respect of which that allotment was made such contracts being duly stamped and file with the registrar copies certified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted the extent to which they are to be treated as paid up and the consideration for which they have been allotted

(2) Where such a contract as above mentioned is not reduced to writing the company shall within one month after the allotment file with the registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899 and the registrar may as a condition of filing the particulars require that the duty payable thereon be adjudicated under section 31 of that Act

(2A) If the registrar is satisfied that in the circumstances of any particular case the period of one month specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit and if he does so the provisions of sub-sections (1) and (2) shall have effect in that particular case as if for the period of one month the extended period allowed by the registrar were substituted

(3) If default is made in complying with the requirements of this section every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues

Provided that, in case of default in filing with the registrar within the time specified in sub-sections (1) and (2) any document required to be filed by this section the company or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper

(4) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles were forfeited by non-payment of calls

P. 88

COMMISSIONS AND DISCOUNTS

105. Power to pay certain commissions and prohibition of payment of all other commissions, discounts etc. (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally for any shares in the company or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company if the payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised and if the amount or rate per cent of the commission paid or agreed to be paid is —

(a) in the case of shares offered to the public for subscription, disclosed in the prospectus or

(b) in the case of shares not offered to the public for subscription disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice

(2) Save as aforesaid and save as provided in section 105A, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance to any person in consideration of his subscribing or agreeing to subscribe whether absolutely or conditionally for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional for any shares in the company whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company or the money be paid out of the nominal purchase-money or contract price, or otherwise

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to promoter of, or other person who receive payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company would have been legal under this section P. 89

105A. Power to issue shares at a discount. (1) Subject to the provisions of this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued

Provided that—

(a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Court,

(b) the resolution must specify the maximum rate of discount (not exceeding ten per cent in any case) at which shares are to be issued,

(c) not less than one year must at the date of issue have elapsed since the date on which the company was entitled to commence business,

(d) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance-sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

(3) If default is made in complying with sub-section (2) the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty rupees. P. 89

105B. Issue of redeemable preference shares. (1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be, liable to be redeemed:

Provided that—

(a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or out of sale proceeds of any property of the company;

(b) no such shares shall be redeemed unless they are fully paid,

(c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund, to be called "the capital redemption reserve fund," a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company;

(d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed.

(2) There shall be included in every balance-sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be, liable to be redeemed or, where no definite date is fixed for redemption, the period of notice to be given for redemption.

If a company fails to comply with the provisions of this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand rupees

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the

fees payable under section 249 be deemed to be increased by the issue of shares in pursuance of this sub-section

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not so far as relates to stamp duty be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares

(5) Where new shares have been issued in pursuance of the last foregoing sub-section, the capital redemption reserve fund may notwithstanding anything in this section be applied by the company up to an amount equal to the nominal amount of the shares so issued in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares

P. 77

105C Further issue of capital Where the directors decide to increase the capital of the company by the issue of further shares such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted will be deemed to be declined, and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company

P. 79

106 Statement in balance-sheet as to commissions and discounts. Where a company has paid any sums by way of commission in respect of any shares or debentures or allowed any sums by way of discount in respect of any debentures the total amount so paid or allowed or so much thereof as has not been written off shall be stated in every balance-sheet of the company until the whole amount thereof has been written off

PAYMENT OF INTEREST OUT OF CAPITAL

107. Power of company to pay interest out of capital in certain cases. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provisions of any plan which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plan

Provided that—

(1) no such payment shall be made unless the same is authorised by the articles or by special resolution,,

(2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Central Government which sanction shall be conclusive evidence for the purposes of this section that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section;

(3) before sanctioning any such payment, the Central Government may, at the expense of the company, appoint a person to inquire and report to the Central Government as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry;

(4) the payment shall be made only for such period as may be determined by the Central Government; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided;

(5) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as the Central Government may, by notification in the official Gazette, prescribe;

(6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid;

(7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate;

(8) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895; or the Indian Tramways Act, 1902, applies.

P. 102

CERTIFICATES OF SHARES, ETC.

108. **Limitation of time for issue of certificates.** (1) Every company shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

P. 90

INFORMATION AS TO MORTGAGES, CHARGES, ETC.

109. **Certain mortgages and charges to be void if not registered.**

(1) Every mortgage or charge created after the commencement of this Act by a company and being either—

(a) a mortgage or charge for the purpose of securing any issue of debentures; or

(b) a mortgage or charge on uncalled share capital of the company;

or

(c) a mortgage or charge, on any immovable property wherever situate, or any interest therein; or

(d) a mortgage or charge on any book debts of the company; or

(e) a mortgage or a charge, not being a pledge on any movable property of the company except stock-in-trade; or

(f) a floating charge on the undertaking or property of the company;

shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable:

Provided that—

(i) in the case of a mortgage or charge created out of British India, comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar; and

(ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration

In this section 'British India' does not include Burma or Aden, whatever the date of the mortgage or charge in question.

P. 117

109A. Registration of charges on properties acquired subject to charge.

(1) Where after the commencement of the Indian Companies (Amendment) Act, 1936, a company registered in British India acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed;

Provided that, if the property is situate and the charge was created outside British India twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees. P. 118

110. Particulars in case of series of debentures entitling holders *pari passu*. Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purpose of section 109 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

- (a) the total amount secured by the whole series, and
- (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined; and
- (c) a general description of the property charged; and
- (d) the names of the trustees (if any) for the debenture-holders: together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register;

Provided that where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debenture issued. P. 118

111. Particulars in case of commission, etc., on debentures. Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount. P. 119

112. Register of mortgages and charge. (1) The registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall, on payment of the prescribed fee, enter in the register, with respect to every such

mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(2) After making the entry required by sub-section (1) the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

P. 119

113. Index to register of mortgages and charges. The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

P. 120

114. Certificate of registration. The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with.

P. 120

115. Endorsement of certificate of registration on debenture or certificate of debenture stock. The company shall cause a copy of every certificate of registration, given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

P. 120

116. Duty of company and right of interested party as regards registration. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under this section are modified, it shall be the duty of the company to send to the registrar the particulars of such modification, and the provisions of this section as to registration of mortgage or a charge shall apply to such modification of the mortgage or charge as aforesaid.

P. 120

117. Copy of instrument creating mortgage or charge to be kept at registered office. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109 to be kept at the registered office of the company. Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient

P. 121

118. Registration of appointment of receiver (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument file notice of the fact with the registrar and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

P. 121

119. Filing of accounts of receivers. (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession shall once in every half-year while he remains in possession and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall, also, on ceasing to act as receiver file with the registrar notice to that effect and the registrar shall enter the notice in the register of mortgages and charges

P. 121

(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods or business letter issued by or on behalf of the company, or the receiver of the company being a document on or in which the name of the company appears shall contain a statement that a receiver has been appointed

(3) If default is made in complying with the requirements of this section, the company and every director, manager, managing agent secretary or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding two hundred rupees

P. 121

120. Rectification of register of mortgages. (1) The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such mortgage or charge or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or share-holders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended or, as the case may be, that

the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit

(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time the mortgage or charge is actually registered

P. 120

121. Registration or satisfaction of mortgages and charges. (1) It shall be the duty of the company to give intimation to the registrar of the payment or satisfaction of any charge or mortgage created by the company and requiring registration under section 109 within twenty-one days from the date of the payment or satisfaction thereof

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the mortgagor calling upon him to show cause, within a time (not exceeding fourteen days) to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded

(3) The registrar shall if no cause is shown, order that a memorandum of satisfaction be entered on the register and shall if required furnish the company with a copy thereof

(4) Where cause is shown the registrar shall record a note to that effect in the register and shall inform the company that he has done so. of the copies or register

P. 121

122. Penalties. (1) If any company makes default in filing with the registrar for registration the particulars -

(a) of any mortgage or charge created by the company, or

(b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 109 or section 109A, or

(c) of the issues of debentures of a series,

requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees

(3) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

123. Company's register of mortgages. (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges spe-

cifically affecting property of the company and all floating charges on the undertaking or on any property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees

P. 121

124. Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages. (1) The copies kept at the registered office of the company in pursuance of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar, and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection as the company may prescribe

(2) If inspection of the said copies of register is refused the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register

P. 121

125. Right to inspect the register of debenture holders and to have copies of trust deed. (1) Every register of holders of debentures of a company shall except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures and of any holder of shares in the company but subject to such reasonable restrictions as the company may in general meeting impose so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust-deed of the sum of one rupee or such less sum as may be prescribed by the company, or, where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly

authorises or permits the refusal, shall incur the like penalty, and the Court may be order compel an immediate inspection of the register. P. 121

DEBENTURES AND FLOATING CHARGES

126. Perpetual debentures. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency however remote, or on the expiration of a period however long. P. 109

127. Power to reissue redeemed debentures in certain cases. (1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have dis-

covered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same. P. 110

128. Specific performance of contract to subscribe for debentures. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance. P. 110

129. Payments of certain debts out of assets subject to floating charge in priority to claims under the charge. (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors P. 115

STATEMENTS, BOOKS AND ACCOUNTS

130. Books to be kept by company and penalty for not keeping proper books. (1) Every company shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; .

(b) all sales and purchases of goods by the company;

(c) the assets and liabilities of the company;

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-

section (2) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2)

(4) In the case of a company managed by a managing agent, the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees

P. 147

131. Annual balance-sheet. (1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance-sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months:

Provided that the registrar may for any special reason extend the period by a period not exceeding three months

(2) The balance-sheet and the profit and loss account or income and expenditure account shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company

(3) Every company other than a private company shall send a copy of such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report to the registered address of every member of the company at least fourteen days before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least fourteen days before that meeting

P. 147

131A. Director's Report. (1) The directors shall make out and attach to every balance-sheet a report with respect to the state of the company's affairs, the amount if any which they recommend should be paid by way of dividend and the amount, if any which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance-sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance-sheet.

(2) The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf of the directors if authorised in that behalf by the directors.

(3) The provisions of sub-section (4) of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section P. 147

132. Contents of balance-sheet. (1) The balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company in accordance with the requirements indicated by the items contained in the form marked F in the Third Schedule giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit

(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of that other company, shall be shown in a note at the foot of the account or in a statement attached thereto P. 148

132A. Balance-sheet to include particulars as to subsidiary companies. (1) Where a company in this Act referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance-sheet of the holding company the last audited balance-sheet, profit and loss account and auditors' report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 133, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt in or for the purposes of the accounts of the holding company and in particular how and to what extent

(a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and

(b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not

be deemed to be a holding company by reason only that part of its assets consist in 51 per cent or more of the shares of another company.

(2) If, in the case of a subsidiary company, the auditors' report on the balance-sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement.

(5) The holding company may by resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The right conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.

P. 148

133. Authentication of Balance-sheet. (1) Save as provided by sub-section (2) the balance-sheet and profit and loss account or income and expenditure account shall—

(i) in the case of a banking company, be signed by the manager or managing agent (if any) and, where there are more than three directors of the company, by at least three of those directors, and where there are not more than three directors, by all the directors;

(ii) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager or managing agent (if any) of the company

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet and profit and loss account or income and expenditure account shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case

there shall be subjoined to the balance-sheet and profit and loss account or income and expenditure account a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

(3) If any default is made in laying before the company or in issuing a balance-sheet and profit and loss account or income and expenditure account as required by section 131 or if any balance-sheet and profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under section 131, section 132, section 132A and this section, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees.

P. 149

134. Copy of balance-sheet to be forwarded to the registrar. (1) After the balance-sheet and profit and loss account or the income and expenditure account as the case may be have been laid before the company at the general meeting three copies thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copies thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

P. 150

135. Right of member of company to copies of the balance-sheet and the auditor's report. Save as otherwise provided in this Act, any member of a company shall be entitled to be furnished with copies of the balance-sheet and the profit and loss account or the income and expenditure account and the auditor's report at a charge not exceeding six annas for every hundred words or fractional part thereof.

STATEMENT TO BE PUBLISHED BY BANKING AND CERTAIN OTHER COMPANIES

136. Certain companies to publish statement in schedule. (1) Every company being a limited banking company or an insurance company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

(2) A copy of the statement together with a copy of the last audited balance-sheet laid before the members of the company shall be displayed

and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society, apply with or without modifications, if the company or society complies with those provisions.

P. 150

INVESTIGATION BY THE REGISTRAR

137. Power of registrar to call for information or explanation. (1) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order.

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence, and the Court may on the application of the registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the registrar for his investigation and allow the registrar inspection thereof on such terms and conditions as it thinks fit.

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the Central Government,

(6) If ~~it is~~ represented to the registrar in materials placed before him by an contributory or creditor that the business of a company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may after giving the company an opportunity of being heard by written order call on the company for information or explanation on matters specified in the order within such time as he may specify in the order and the provisions of sub-sections (2), (3) and (5) of this section shall apply to such order. If upon investigation the registrar is satisfied that any representation on which he has taken action under this sub-section is frivolous or vexatious, he shall disclose the identity of the informant to the company.

(7) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act P. 150

INSPECTION AND AUDIT

138. Investigation of affairs of company by inspectors. The Central Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Central Government may direct—

(i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued;

(ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;

(iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members;

(iv) in the case of any company, on a report by the registrar under section 137, sub-section (5) P. 151

139. Application for inspection to be supported by evidence. An application by members of the company under section 138 shall be supported by such evidence as the Central Government may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation; and the Central Government may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry. P. 151

140. Inspection of books and examination of officers. (1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody of power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence. P. 151

141. Results of examination how dealt with. (1) On the conclusion of the investigation, the inspectors shall report their opinion to the Central Government, and a copy of the report shall be forwarded by the Central Government to the registrar and another copy to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them

(2) The report shall be written or printed, as the Central Government directs

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the Central Government directs the same to be paid by the company which the Central Government is hereby authorised to do:

Provided that the expenses of and incidental to an investigation held in pursuance of clause (iv) of section 138 shall be paid out of the assets of the company and shall be recoverable as an arrear of land-revenue

(4) The registrar shall keep the copy of the report sent to him with the records of the company in his custody P. 151

141A. Institution of prosecutions. (1) If from any report made under section 138 it appears to the Central Government that any person has been guilty of any offence in relation to the company for which he is criminally liable the Central Government shall refer the matter to the Advocate General or the Public Prosecutor

(2) If the officer to whom the matter is referred considers that the case is one in which a prosecution ought to be instituted, he shall cause proceedings to be instituted, and it shall be the duty of all officers and agents of the company, past and present (other than the accused in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give

(3) For the purposes of sub-section (2), the expression "agents" in relation to a company shall be deemed to include the bankers and legal advisers of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company

(4) Any director, manager or other officer of the company convicted as the result of a prosecution initiated under this section shall not without the leave of the Court be a director of or in any way whether directly or indirectly be concerned in or take part in the management of a company for a period of five years from the date of such conviction P. 151

142. Power of company to appoint inspectors. (1) A company may by special resolution appoint inspectors to investigate its affairs

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Central Government, except that, instead of reporting to the Central Government, they shall report in such manner and to such persons as the company in general meeting may direct

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or docu-

ment required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Central Government. P. 152

143. Report of inspectors to be evidence. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report. P. 152

144. Qualifications and appointment of auditors. (1) No person shall be appointed or act as an auditor of any company other than a private company not being the subsidiary company of a public company unless he holds a certificate from the Central Government entitling him to act as an auditor of companies:

Provided that a firm whereof all the partners practising in India hold such certificates may be appointed by its firm-name to be auditor of a company, and may act in its firm-name

(2) The Central Government may, by notification in the official Gazette and after previous publication make rules providing for the grant, renewal or cancellation of such certificate and prescribing conditions and restrictions for such grant, renewal or cancellation

Provided that nothing contained in such rules shall preclude any person from being granted a certificate merely by reason that he does not practise as a public accountant

(2A) In particular, and without prejudice to the generality of the foregoing power such rules may—

(a) provide for the maintenance of a Register of Accountants entitled to apply for such certificates,

(b) prescribe the qualifications for enrolment on the Register and the fees therefor;

(c) provide for the examination of candidates for enrolment, and prescribe the fees to be paid by examinees;

(d) prescribe the circumstances in which the name of any person may be removed from or restored to the Register,

(e) provide for the establishment, constitution and procedure of an Indian Accountancy Board, consisting of persons representing the interests principally affected or having special knowledge of accountancy in India, to advise it on all matters of administration relating to accountancy, and to assist it in maintaining the standards of qualification and conduct of persons enrolled on the Register; and

(f) provide for the establishment, constitution and procedure of local accountancy boards at such centres as the Central Government may select, to advise it and the Indian Accountancy Board on any matter that may be referred to them.

(2B) The holder of a certificate granted under this section shall be entitled to be appointed and act as an auditor of companies throughout British India.

(3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(4) If an appointment of an auditor is not made at an annual general meeting, the Central Government may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons: that is to say,

(i) a director or officer of the company; and

(ii) a partner of such director or officer; and

(iii) in the case of a company other than a private company, not being the subsidiary company of a public company any person in the employment of such director or officer, and

(iv) any person indebted to the company shall not be appointed auditors of the company and if any person after being appointed auditor becomes indebted to the company his appointment shall thereupon be terminated.

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting:

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditors, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

P. 152

145. Powers and duties of auditors. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and

vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet and profit and loss account laid before the company in general meeting during their tenure of office, and the report shall state:—

(a) whether or not they have obtained all the information and explanations they have required; and

(b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; and

(c) whether or not such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company; and

(d) whether in their opinion books of account have been kept by the company as required by section 130.

(2A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer.

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India

(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts

(5) If any auditors' report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees

P. 133

146. Rights of preference shareholders, etc. as to receipts and inspection of reports, etc. (1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets and profit and loss accounts of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company nor to a company registered before the commencement of this Act:

Provided that in the case of any public company whether registered before or after the commencement of this Act the trustees for holders of debentures shall have the right conferred by sub-section (1) on holders of preference shares and debentures of a company

P. 148

CARRYING ON BUSINESS WITH LESS THAN THE LEGAL MINIMUM OF MEMBERS

147. Liability for carrying on business with fewer than seven or, in the case of a private company, two members. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member. P. 166

SERVICE AND AUTHENTICATION OF DOCUMENTS

148. Service of documents on company. A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company.

149. Service of documents on registrar. A document may be served on the registrar by sending it to him by post, or delivering it to him, or by leaving it for him at his office.

150. Authentication of documents. A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

TABLES FORMS AND RULES AS TO PRESCRIBED MATTERS

151. Application and alteration of tables and forms, and power to make rules as to prescribed matters. (1) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2) The Central Government may alter any of the tables and forms in the First Schedule, so that it does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule.

(3) Any alteration or addition made under sub-section (1) shall be published in the official Gazette, and on such publication the table or form as so altered or the added form, as the case may be, shall have effect as if enacted in this Act, but no alteration made by the Central Government in Table A in the First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that table.

(4) In addition to the powers hereinbefore conferred by this section, the Central Government may make rules providing for all or any matters which by this Act are to be prescribed by its authority.

(5) Every such rule shall be published in the official Gazette, and on such publication shall have effect as if enacted in this Act. P. 16

ARBITRATION AND COMPROMISE

152. Power for companies to refer matters to arbitration. (1) A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1940, an existing or future difference between itself and any other company or person.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3) The provisions of the Indian Arbitration Act, 1940, shall apply to all arbitrations between companies and persons in pursuance of this Act.

P. 158

153. Power to compromise with creditors and members. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company

(4) If a company makes default in complying with sub-section (3) the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.

(6) In this section the expression "company" means any company liable to be wound up under this Act and the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares

into shares of different classes or by both those methods, and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

(7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeals from the decisions of the Court.

P. 158

153A. Provisions for facilitating arrangements and compromises.

(1) Where an application is made to the Court under section 153 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a 'transferor company') is to be transferred to another company (in this section referred to as 'the transferee company'), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:—

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person,

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the registrar for registration within fourteen days after the completion of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is

knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(4) In this section the expression 'property' includes property, rights and powers of every description, and the expression 'liabilities' includes duties

(5) Notwithstanding the provisions of sub-section (6) of section 153, the expression 'company' in this section does not include any company other than a company within the meaning of this Act. F. 160

153B. Power to acquire shares of shareholders dissenting from scheme or contract approved by majority. (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as the 'transferee company'), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company:

Provided that, where any such scheme or contract has been so approved at any time before the commencement of the Indian Companies (Amendment) Act, 1936, the Court may by order, on an application made to it by the transferee company within two months after the commencement of that Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the Court may by the order direct instead of the terms provided by the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust

for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression 'dissenting shareholder' includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract. P. 161

CONVERSION OF PRIVATE COMPANY INTO PUBLIC COMPANY

154. Conversion of private company into public company. (1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions of clause (13) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company, shall, as on the date of the alteration, cease to be a private company, and shall, within a period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule.

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees.

(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act shall apply to the company as if it were not a private company:

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid. P. 167

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PART V.

Winding Up

PRELIMINARY

155. Mode of winding up. (1) The winding up of a company may be either

- (i) by the Court; or
- (ii) voluntary; or
- (iii) subject to the supervision of the Court.

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes. P. 177

CONTRIBUTORIES

156. Liability as contributories of present and past members. (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say):—

(i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;

(ii) a past member shall not be liable to contribute in respect of any debt, or liability of the company contracted after he ceased to be a member;

(iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;

(iv) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member;

(v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;

(vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;

(vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustments of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sum unpaid on any shares held by him.

F. 196

157. Liability of directors whose liability is unlimited. In the winding up of a limited company any director whether past or present, whose liability is in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company:

Provided that—

(i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up;

(ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;

(iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company and the costs, charges and expenses of the winding up. P. 195

158. Meaning of "contributory." The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory. P. 193

159. Nature of liability of contributory. (1) The liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator.

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns. P. 194

160. Contributories in case of death of member. (1) If a contributory dies either before or after he has been placed on the list of contributories, his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

(2) If the legal representatives of heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether moveable or immovable, or both, and of compelling payment thereof of the money due.

(3) For the purposes of this section the surviving coparceners of a contributory who is a member of a Hindu joint family governed by the Mitakshara School of Hindu law shall be deemed to be his legal representatives and heirs. P. 195

161. Contributories in case of insolvency of member. If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

(1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made. P. 195

WINDING UP BY COURT

162. Circumstances in which company may be wound up by Court.
A company may be wound up by the Court—

- (i) if the company has by special resolution resolved that the company be wound up by the Court;
- (ii) if default is made in filing the statutory report or in holding the statutory meeting;
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year,
- (iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven;
- (v) if the company is unable to pay its debts;
- (vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

P. 177

163. Company when deemed unable to pay its debts. (1) A company shall be deemed to be unable to pay its debts—

(i) if a creditor, by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing the same to be delivered by registered post or otherwise at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (i) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or by a legal adviser or any one member of the firm on behalf of the firm.

P. 178

164. Winding up may be referred to District Court. Where the High Court makes an order for winding up a company under this Act, it may if it thinks fit, direct all subsequent proceedings to be had in a District Court; and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

165. Transfer of winding up from one District Court to another. If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more conveniently pro-

securated in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

166. Provisions as to applications for winding up. An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately, or by the registrar.

Provided that—

(a) a contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder;

(aa) the registrar shall not be entitled to present a petition for winding up a company—

(i) except on the ground that from the financial condition of the company as disclosed in its balance-sheet or from the report of an inspector appointed under section 138 it appears that the company is unable to pay its debts, and

(ii) unless the previous sanction of the Central Government has been obtained to the presentation of the petition.

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard

(b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held;

(c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

P. 180

167. Effect of winding up order. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

P. 182

168. Commencement of winding up by Court. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

P. 182

169. Court may grant injunction. The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit P. 182

170. Powers of Court on hearing the petition. (1) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court, shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting the Court may order the costs to be paid by any persons who in the opinion of the Court, are responsible for the default

(3) Where the Court makes an order for the winding up of a company it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver P. 183

171. Suits stayed on winding up order. When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose P. 183

171A. Vacancy in the office of liquidator. (1) For the purposes of this Act, so far as it relates to the winding up "of" companies by the Court, the term 'official receiver' means the official receiver attached to the Court, or, if there is no such official receiver then such person as the Central Government may, by notification in the official Gazette, appoint for the purpose

(2) On the making of a winding up order the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the Court

(3) The official receiver shall as such official liquidator forthwith take into his custody and control all the books, documents and the assets of the company

(4) The official receiver shall be entitled to such remuneration as the Court shall fix P. 207

172. Copy of winding up order to be filed with registrar. (1) On the making of a winding up order it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a copy of the order within a month from the date of the making of the order

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued. P. 185

183. Power of Court to stay winding up. The Court may, at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit. P. 183

17. Court may have regard to wishes of creditors or contributories. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

OFFICIAL LIQUIDATORS

175. Appointment of official liquidator. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons other than the official receiver to be called an official liquidator or official liquidators.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up but shall before making any such appointment give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice.

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment: Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator. P. 207

176. Resignations, removals, filling up vacancies and compensation.

(1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court and until the vacancy is so filled up the official receiver shall be and act as the official liquidator.

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs. P. 208

177. Official liquidator. The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name. P. 208

177A. Statement of affairs to be made to the liquidator. (1) Where the Court has made a winding up order or appointed an official liquidator provisionally, there shall, unless the Court thinks fit to order otherwise and so orders, be made out and submitted to the official liquidator a statement as to the affairs of the company verified by an affidavit and containing the following particulars, namely:

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;

(b) the debts and liabilities;

(c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of secured debts particulars of the securities, their value and the dates when they were given;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the secretary, manager or other chief officer of the company, by such of the persons hereinafter in this sub-section mentioned as the official liquidator, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons—

(a) who are or have been directors or officers of the company;

(b) who have taken part in the formation of the company at any time within one year before the relevant date;

(c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator capable of giving the information required;

(d) who are or have been within the said year officers of or in the employment of a company, which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code and shall, on the application of the liquidator or of the official receiver, be punishable accordingly

(8) In this section the expression 'the relevant date' means, in a case where a provisional liquidator is appointed, the date of his appointment, and, in a case, where no such appointment is made, the date of the winding up order

P. 208

177B. Statement by liquidator. (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 177A, and not later than four, or with the leave of the Court, six months from the date of the order, or in the case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court—

(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities giving separately under the heading of assets particulars of—

- (i) cash and negotiable securities,
- (ii) debts due from contributories
- (iii) debts due to and securities, if any available to the company,
- (iv) movable and immovable properties belonging to the company,
- (v) unpaid calls and

(b) if the company has failed, as to the causes of the failure, and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion formation, or failure of the company or the conduct of the business thereof

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court

P. 209

178. Custody of company's property (1) The official liquidator whether appointed provisionally or not shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled

(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company

P. 208

178A. Committee of Inspection in compulsory winding up. (1) The official liquidator shall within a month from the date of the order for the winding up of a company convene a meeting of the creditors of the company (as ascertained from the books and documents of the company) for the purpose of determining whether or not a committee of inspection

shall be appointed to act with the liquidator, and who are to be members of the committee, if appointed

(2) The official liquidator shall within a week from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for directions as to whether there shall be a committee of inspection and, if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of not more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times

(6) The committee shall meet at such times as they may from time to time appoint, and, failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator

(9) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant

(10) A member of the committee may be removed by an ordinary resolution at a meeting of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting

(11) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(12) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee

P. 210

179. Powers of official liquidator. The official liquidator shall have power, with the sanction of the Court, to do the following things —

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same;

(c) to sell the immovable and moveable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(d) to do all acts and execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal,

(e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors

(f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) to raise on the security of the assets of the company any money requisite;

(h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself. Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator General;

(i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets

P. 211

180. Discretion of official liquidator. The Court may provide by an order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order of appointing him.

P. 211

181. Provision for legal assistance to official liquidator. The official liquidator may, with the sanction of the Court, appoint an advocate attorney or pleader entitled to appear before the Court to assist him in the performance of his duties: Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration.

P. 211

182. Liquidator to keep books containing proceedings of meetings and to submit account of his receipts to Court. (1) The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor, or contributory may, subject to

the control of the Court, personally or by his agent inspect any such books.

(2) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.

(3) The account shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form.

(4) The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers and information as the Court may require, and the Court may at any time require the production of and inspect any books or accounts kept by the liquidator.

(5) When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the registrar for filing, and each copy shall be open to the inspection of any creditor, or of any person interested. P. 212

183. Exercise and control of liquidator's powers. (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances. P. 212

ORDINARY POWERS OF COURT

184. Settlement of list of contributories and application of assets.

(1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of mem-

bers in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

P. 183

185. Power to require delivery of property. The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

P. 183

186. Power to order payment of debts by contributory. (1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Pp. 183, 196.

187. Power of Court to make calls. (1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

P. 183

188. Power to order payment into bank. The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the account of the official liquidator in any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank

of India Act, 1934, instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

P. 183

189. Regulation of account with Court. All moneys, bills, hundis, notes and other securities paid and delivered into the Bank where the liquidator of the Company may have his account, in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

P. 183

190. Order on contributory conclusive evidence. (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceeding whatsoever.

P. 183

191. Powers to exclude creditors not proving in time. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

192. Adjustment of rights of contributories. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto

P. 183

193. Power to order costs. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just

P. 184

194. Dissolution of company. (1) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.

P. 206

EXTRAORDINARY POWERS OF COURT

195. Power to summon persons suspected of having property of company. (1) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce the answers to writing and require him to sign them.

(3) The Court may require him to produce any documents in his custody or power relating to the company; but, where he claims any lien

on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sittings, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination. P. 184

196. Power to order public examination of promoters, directors, etc.

(1) When an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company, in relation to the company since its formation, the Court may after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him

(6) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him. Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8) The Court may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an official referee, master, registrar or deputy registrar, and the powers of the Court under this sec-

tion as to the conduct of the examination but not as to costs, may be exercised by the person before whom the examination is held. P. 184

197. Power to arrest absconding contributory. The Court, at any time either before or after making a winding up order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable property to be seized, and him and them to be safely kept until such time as the Court may order.

P. 184

198. Saving of other sums. Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any calls or other sums.

P. 184

ENFORCEMENT OF AND APPEAL FROM ORDERS

199. Power to enforce orders. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced

200. Order made in any Court to be enforced by other Courts. Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same

201. Mode of dealing with orders to be enforced by other Courts. Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

202. Appeals from orders. Re-hearings of and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

P. 184

VOLUNTARY WINDING UP

203. Circumstances in which company may be wound up voluntarily. A company may be wound up voluntarily—

(1) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence

of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(2) if the company resolves by special resolution that the company be wound up voluntarily;

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up;

and the expression 'resolution for voluntarily winding up' when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section.

P. 184

204. Commencement of voluntary winding up. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntarily winding up

P. 185

205. Effect of voluntary winding up on status of company. When a company is wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved

206. Notice of resolution to wind up voluntarily. (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the official Gazette, and also in some newspaper (if any) circulating in the district where the registered office of the company is situate.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty.

P. 184

207. Declaration of solvency. (1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up.

(2) Such declaration shall be supported by a report of the company's auditors on the company's affairs, and shall have no effect for the purposes of this Act unless it is delivered to the registrar for registration before the date mentioned in sub-section (1) of this section.

(3) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to

as 'a members' voluntary winding up,' and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditor's voluntary winding up.' P. 185

MEMBERS' VOLUNTARY WINDING UP

208. Provisions applicable to a members' voluntary winding up. The provisions contained in sections 208A to 208E, both inclusive, shall apply in relations to a members' voluntary winding up. P. 185

208A. Power of company to appoint and fix remuneration of liquidators. (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof. P. 185

208B. Power to fill vacancy in office of liquidator. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

(2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3) The meeting shall be held in manner provided by this Act or by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court. P. 185

208C. Power of liquidator to accept shares, etc., as consideration for sale of property of company. (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the transferee company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into

effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase-money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) The provisions of the Indian Arbitration Act, 1940, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section. P. 191

208D. Duty of liquidator to call general meeting at end of each year.

(1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees P. 187

208E. Final meeting and dissolution. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for publication of a notice under that sub-section.

(3) Within one week after the meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues:

Provided that, if a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with,

(4) The registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within twenty-one days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

P. 188

CREDITORS' VOLUNTARY WINDING UP

209. Provisions applicable to a creditors' voluntary winding up. The provisions contained in sections 209A to 209H, both inclusive, shall apply in relation to a creditors' voluntary winding up

P. 186

209A. Meeting of creditors. (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section

(3) The directors of the company shall—

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid, and

(b) appoint one of their number to preside at the said meeting

(4) It shall be the duty of the director appointed to preside at the meeting of the creditors to attend the meeting and preside thereat

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company

(6) If the default is made—

(a) by the company in complying with sub-sections (1) and (2);

(b) by the directors of the company in complying with sub-section (3);

(c) by any director of the company in complying with sub-section (4).

the company, directors or director, as the case may be, shall be liable to a fine not exceeding one thousand rupees and, in the case of default by the company, every officer of the company who is in default shall be liable to the like penalty. **P. 186**

209B. Appointment of liquidator. The creditors and the company at their respective meeting mentioned in section 209A may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any nominated by the company shall be liquidator:

Provided that in the case of different persons being nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors. **P. 186**

209C. Appointment of committee of inspection. The creditors at the meeting to be held in pursuance of section 209A or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to act as members of the committee not exceeding five in number:

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution **P. 187**

209D. Fixing of liquidators' remuneration and cesser of directors' powers. (1) The committee of inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court.

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof. **P. 187**

209E. Power to fill vacancy in office of liquidator. If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by, or by the direction of, the Court, the creditors may fill the vacancy **P. 187**

209F. Application of section 208C to a creditors' voluntary winding up. The provisions of section 208C shall apply in the case of a creditors' voluntary winding up as in the case of a members' voluntary winding up with

the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.

P. 191

209G. Duty of liquidator to call meetings of company and of creditors at the end of each year. (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of winding up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.

P. 188

209H. Final meeting and dissolution. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof.

(2) Each such meeting shall be called by advertisement specifying the time, place and object thereof and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section

(3) Within one week after the date of the meetings, or, if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues:

Provided that, if a quorum (which for the purposes of this section shall be two persons) is not present at either such meeting, the liquidator shall, in lieu of such return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall, in respect of that meeting, be deemed to have been complied with.

(4) The registrar on receiving the account and in respect of each such meeting either of the returns mentioned in sub-section (3) shall forthwith register them, and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within ten days after the making of the order, to deliver to the registrar a certified copy of the order

for registration, and if that person fails to do so he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

P. 188

MEMBERS' OR CREDITORS' VOLUNTARY WINDING UP

210. Provisions applicable to every voluntary winding up. The provisions contained in sections 211 to 218, both inclusive, shall apply to every voluntary winding up whether a members' or a creditors' winding up

P. 187

211. Distribution of property of company. Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company

P. 187

212. Powers and duties of liquidator in voluntary winding up. (1) The liquidator may—

(a) in the case of a members' winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up with the sanction of either the Court or the committee of inspection exercise any of the powers given by clauses (d), (e), (f) and (h) of section 179 to a liquidator in a winding up. The exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers

(b) without the sanction referred to in clause (a), exercise any of the other powers by this Act given to the liquidator in winding up by the Court,

(c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories,

(d) exercise the power of the Court of making calls,

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two

P. 213

213. Power of Court to appoint and remove liquidator in voluntary winding up. (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator

(2) The Court may, on cause shown, remove a liquidator and appoint another liquidator

P. 187

214. Notice by liquidator of his appointment. (1) The liquidator shall, within twenty-one days after his appointment, deliver to the registrar for registration a notice of his appointment in the form prescribed.

- (g) Where the business done or to be done includes life insurance and all the classes specified in clauses (b), (c), and (d), Rs. 4,50,000/- of which Rs. 2,00,000/- shall be the deposit for life insurance business.
- (h) Where the business done or to be done does not include life insurance but any two of other classes, Rs. 2,50,000/-
- (i) Where the business done or to be done does not include life insurance but includes all the other classes, Rs. 3,50,000/-.
- (j) Where the business done or to be done is marine insurance relating to country craft or its cargo, Rs. 10,000/-.

For insurers having contracts with underwriters of the Society of Lloyds, the requirement is that they have to deposit one and half times the deposit for each class of insurance business as specified above

An insurance company, incorporated in India under the Indian Companies Act, 1913 and an insurer having his or his principal business or domicile in India and an insurer incorporated or domiciled in the United Kingdom, incorporated or carrying on business before the 27th day of January, 1937 may, where its business is life insurance only, make the deposit in not more than ten instalments, of which the first must not be less than one fourth of the total amount of the deposit, and be paid before the application for registration is made, the second must be not less than one ninth of the balance of the deposit and be paid before 1st January 1939 and the subsequent instalments must be not less than the second one and be paid before 1st January of each succeeding year¹ But where the business of such insurers is not only life but also other forms of insurance or other forms of insurance excepting life the deposit may be made in not more than seven instalments, of which the first must be of the same amount and in the same manner as in the previous case, the second must be not less than one sixth of the balance of the deposit and be paid on the same date as in the previous case and the subsequent instalments must be not less than the second and be paid

¹ The Insurance Act, 1938, S. 7 (3).

on the same date and in the same manner as in the previous case.¹

In the case of such insurers where they were neither incorporated before nor carrying on business before the 27th of January, 1937, the deposit may be made in instalments of not less than one fourth the total amount before the application for registration is made, not less than one third the balance before the expiry of one year from the commencement of business in British India, and not less than one half of the residue before the expiry of two years from the commencement of business in British India and the balance before the expiry of three years from the commencement of business in British India.

In case of insurers other than those referred to above incorporated or carrying on business before 27th January, 1937, the deposit must be made in two instalments, of which the first shall be not less than one half of the total amount of the deposit and be paid before the application for registration has been made, and the second must be made before the expiry of one year from the date of registration.² Where such insurers were neither incorporated nor carrying on business before 27th January, 1937 the deposit must be made in full before the application for registration is made.³

An insurer must not undertake new classes of business other than those for which he is liable to make deposit, until the deposit for which he is liable has been made in full.⁴

If any part of the deposit made under the Act is used in the discharge of any liability of the insurer, the insurer must deposit such additional sum as would cover the deficiency and the insurer shall be deemed to have failed to comply with the requirements of the Act unless the deficiency is supplied within two months from the date when the deposit or any part thereof is so used for the discharge of liabilities.⁵

Reservation of Deposits :

The deposit which is made by every insurer is to be deemed

¹ Ibid, S. 7 (3).

² Insurance Act, 1938, S. 7 (4)

³ Ibid, S. 7 (5).

⁴ Ibid, S. 7 (6).

⁵ Ibid, S. 7 (10).

to be part of the assets of the insurer. But the insurer cannot deal with it by way of transfer, assignment or charge or use it for the discharge of any of his liabilities except those arising out of policies of insurance issued by him so long any of such liabilities remain undischarged. It is also not liable to attachment in execution of any decree except a decree obtained by a policyholder of the insurer in respect of a debt due upon a policy which debt the policyholder has failed to realise in any other way. The deposit made by an insurer in respect of life insurance business is not available for the discharge of any liability of the insurer excepting those arising out of policies of insurance issued by him.¹

Refund of Deposits :

Where an insurer ceases to carry on in British India any insurance business or any class of insurance business in respect of which a deposit has been made under the Act and his liabilities in respect of his insurance business or of that branch of insurance business have been satisfied or are otherwise provided for, the court may, on the application of the insurer, order the return of the whole of the deposit in case the insurer has stopped all business or so much of it as does not relate to the classes of insurance which he continues to carry on in case the insurer ceases to do a particular class of insurance only and confirms other classes.²

Separation of Account and Funds :

Where an insurer carries on different classes of insurance business e.g., life, marine or fire, he must keep a separate account of all receipts and payments in respect of each such class of insurance business.³ If the insurer carries on life insurance business along with other classes, the excess of receipts over payments in respect of such business must be carried to and form a separate fund called the 'life insurance fund' and the deposit made by the insurer in respect of life insurance business is to form a part of such fund.⁴ The life insurance fund is to be as absolutely the security of the life policy-holders as though it belonged to an insurer carrying on no other business than life insurance business

¹ Insurance Act, 1938, S. 7. (4).

² Ibid, S. 9.

³ Ibid, S. 10 (1).

⁴ Ibid, S. 10 (2).

and will not be liable for any liability of the insurer other than those connected with his life insurance business.¹

Accounts, Balance Sheet ; Profit and Loss and Revenue Account :

Every insurer, in the case of an Indian company incorporated under Indian law or an insurer having his or its principal place of business or domicile in British India in respect of all insurance business transacted by him and in the case of any other insurer in respect of the insurance business transacted by him in India must at expiration of each calendar year prepare with reference to that year.²—

- (a) a balance sheet in the form set forth in part II of the first schedule to the Act and in accordance with the regulations contained in part I of that schedule. The form and regulations are set out below. The requirements of a balance sheet will appear from the regulations.
- (b) a profit and loss account in the forms set out in part II of the second schedule to the Act and in accordance with the regulations contained in part I of that schedule except where the insurer carries on only life insurance or fire insurance or marine insurance business. The forms and regulations are set out below. The requirements of a profit and loss account will appear from the regulations.
- (c) a revenue account in the form or forms set forth in part II of the Third schedule to the Act and in accordance with the regulations contained in part I of that schedule. The requirements of a revenue account will appear from the regulations.

Where the insurer is a company incorporated in India the accounts and statements referred to above should be signed in accordance with the provisions of the Indian Companies Act, 1913. But in the case of a foreign company the statements and accounts should be signed by the chairman, if any, and two directors and the principal officer of the company and in the case

¹ Ibid, S. 10 (3).

² Insurance Act, 1938, S. (1).

of a partnership firm by two partners of the firm or in the case of a single ownership concern by the insurer himself. The accounts and statements must be accompanied by a statement containing the names and descriptions of the persons in charge of the management of the business during the period to which such accounts and statements refer and by a report by such persons on the affairs of the business during that period.

THE FIRST SCHEDULE.

(See section 11.)

Regulations and Forms for the preparation of Balance-Sheet

PART I.

Regulations.

1. The balance-sheet required to be prepared in respect of every class of business carried on by an insurer is, in the form in which it is set out in Part II of this Schedule (Form A), appropriate to a case where the insurer maintains a separate fund in respect of life insurance business.

2. The balance-sheet of life insurance business shall be prepared as a separate document. The balance-sheet of any class of business may be prepared as a separate document instead of being incorporated by the addition of columns and headings in the general balance-sheet, but the totals of each such separate balance-sheet (showing the total assets of the class of business, the balance at the credit of the life insurance fund or other separate fund or account, the amount of shareholders' undivided profits, and outstanding liabilities) must in any case be incorporated in the general balance-sheet.

3. If any combined balance-sheet is for any purpose issued by an insurer, it shall be in accordance with the Form set out in this Schedule, and there shall not be included among the assets shown in any such combined balance-sheet any amount in respect of any holding in or advance to any insurer whose assets and liabilities have been incorporated therein. Every combined balance-sheet must show clearly on the face thereof that it is a combined balance-sheet and must set out fully the name of every insurer whose assets and liabilities have been incorporated therein; if the assets and liabilities of any person not being an insurer are included in a combined balance-sheet the fact must be stated thereon.

4. Where any guarantee has been given by an insurer (otherwise than in the ordinary course of re-insurance business) in respect of the policies of any other insurer, the balance-sheet of the insurer by whom the guarantee was given must show clearly the name of every insurer whose policies have been so guaranteed and the extent of the guarantee:

Provided that this regulation shall not apply where a combined balance-sheet is issued incorporating the assets and liabilities of the insurer whose policies are guaranteed.

5. Where any part of the assets of an insurer is deposited in any place outside British India as security for the owners of policies issued in that place, the balance-sheet shall state that part of the assets has been so deposited, and, if any such part forms part of the life insurance fund, shall show the amount thereof and the place where it is deposited. Where any combined balance-sheet is issued by an insurer for any purpose, the information required by this regulation shall be shown in the aggregate in respect of all the insurers whose assets and liabilities have been incorporated in the balance-sheet.

6. There shall be appended to the balance-sheet a statement in Form AA as set out in Part II of this Schedule showing the market value and the book value of the assets in India.

7. Every balance-sheet shall contain the following certificates, namely:—

- (a) a certificate signed by the same persons as are required by this Act to sign the balance-sheet explaining how the values as shown in the balance-sheet of the Investments in Stocks and Shares have been arrived at, and how the market value thereof has been ascertained for the purpose of comparison with the values so shown ;
- (b) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and signed also, so far as respects the value of any items shown in the balance-sheet under the heading of "Reversions and Life Interests," by an actuary, certifying that the value of all the assets have been reviewed as at the date of the balance-sheet, and that in their belief the assets set forth in the balance-sheet are shown in the aggregate at amounts not exceeding their realisable or market value under the several headings—"Loans," "Reversions and Life Interests," "Investments," "Agent's Balances," "Outstanding Premiums," "Interest, Dividends and Rents outstanding," "Interest, Dividends and Rents accruing but not due," "Amounts due from other Persons or Bodies carrying on Insurance Business," "Sundry Debtors," "Bills Receivable," "Cash" and the several items specified under "Other Accounts" :

Provided that if the persons signing the certificate are unable to certify that the assets set forth in the balance-sheet are so shown as aforesaid, a full explanation of the bases upon which the values shown in the balance-sheet have been assessed shall be given in the certificate ;

- (c) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and by the auditor certifying that no parts of the assets of the life insurance fund has been directly or indirectly applied in contravention of the provisions of this Act relating to the application and investment of life insurance funds ; and
- (d) certificates signed by the auditor (which shall be in addition to any other certificate or report which he is required by law to give with respect to the balance-sheet) certifying—
 - (i) that he has verified the cash balances and the securities

relating to the insurer's loans, reversions and life interests, and investments ;

- (ii) to what extent, if any, he has verified the investments and transactions relating to any trusts undertaken by the insurer as trustee ; and
- (iii) in the case of a combined balance-sheet, that he has audited the balance sheet and accounts of every insurer whose assets and liabilities are incorporated therein, or that any such balance sheet and accounts which have not been audited by him have been certified by independent auditors. The said certificate shall contain a reference to such reservations, if any, as may have been made by any auditor upon any report or certificate given by him with respect to the balance-sheet and accounts of any insurer whose assets and liabilities are incorporated in the combined balance sheet

8. If the values shown in the balance sheet in respect of "Holdings in Subsidiary Companies" or "House property (i) in India (ii) out of India" have been increased since the last previous balance sheet, the certificate required by paragraph (b) of the last foregoing regulation shall state the amount of every increase not solely due to the cost of subsequent additions or, as respects holdings in controlled companies, to increased profits, and shall contain an explanation of the reason therefor

9. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely —

- (a) "combined balance sheet" includes any combined statement made by an insurer of assets and liabilities in the form of a balance sheet which includes the assets and liabilities of any other insurer, and
- (b) "market value" means as respects any asset the market value thereof as ascertained from published market quotations or, if there be no such value, its fair value as between a willing buyer and a willing seller

PART II.
FORMS.

FORM A.

Form of Balance-sheet.

Balance-sheet of 19

| | Life and Annuity Business. (1) | Other Classes of Business. (2)* | Total | | Life and Annuity Business (1) | Other Classes of Business (2)* | Total. |
|--|--------------------------------|---------------------------------|-----------|--|-------------------------------|--------------------------------|-----------|
| — | Rs. A. P. | Rs. A. P. | Rs. A. P. | — | Rs. A. P. | Rs. A. P. | Rs. A. P. |
| Shareholders' Capital (each class to be stated separately) | | | | | | | |
| Authorised : | | | | | | | |
| Shares of Rs. each Rs. | | | | Loans : | | | |
| | | | | On Mortgages of property within British India | | | |
| Subscribed : | | | | On Mortgages of property outside British India | | | |
| Shares of Rs. each Rs. | | | | On Security of municipal and other public rates | | | |
| Called up : | | | | On Stocks and Shares | | | |
| Shares of Rs. each Rs. | | | | On Insurer's policies within their surrender value | | | |
| Less Unpaid calls Rs. | | | | On Personal security To Subsidiary Companies (other than Reversionary) (f) | | | |
| Reserve or Contingency Accounts (a) : | | | | | | | |
| Investment Reserve A/c. | | | | | | | |

| | |
|--|--|
| Profit and Loss Appropriation Account Balance | Reversions & Life Interests : |
| Balances of Funds and Accounts : | Reversions and Life Interests purchased .. |
| Life Insurance Fund | Loans on Reversions and Life Interests .. |
| Fire Insurance Business Account | Debentures and Debenture Stocks of Subsidiary Reversionary Companies (f) |
| Marine Insurance Business Account | Ordinary Stocks and Shares of Subsidiary Reversionary Companies (f) |
| Accident and Miscellaneous Insurance Business A/c | Loans to Subsidiary Reversionary Companies (f) |
| Other accounts, if any (to be specified) (i) | Investments : |
| Pension or Superannuation Accounts (b) | Deposit with the Reserve Bank of India (Securities to be specified) |
| Debenture Stock per cent. Loans and Advances (c) | Indian Government Securities |
| Bills Payable (c) | Provincial Government Securities |
| Estimated Liability in respect of outstanding claims, whether due or intimated (d) | British, British Colonial and British Dominion Government Securities |
| Annuities due and unpaid (d) | Foreign Government Securities |
| Outstanding Dividends | Indian Municipal Securities |
| Amounts due to Other Persons or Bodies carrying on Insurance Business (c) | British and Colonial Securities |
| Sundry Creditors (including outstanding and | Foreign Securities |
| | Bonds, Debentures, Stocks |

FORM A—contd.

| — | Life and Annuity Business. (1) | Other Classes of Business. (2)* | Total. |
|---|-----------------------------------|---|-----------|
| accruing expenses and Taxes) (c) Other sums owing by the insurer (particulars to be given) (c) Contingent Liabilities (to be specified) (e) | Rs. A. P. | Rs. A. P. | Rs. A. P. |
| Rs. — | | and other Securities whereon Interest is guaranteed by the Indian Government or a Provincial Government Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the British or any Colonial Government Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by any Foreign Government Debentures of any railway in India Debentures of any railway out of India Preference or guaranteed Shares of any railway in India | Rs. A. P. |

| | |
|--|--|
| Preference or guaranteed Shares of any railway out of India | |
| Railway Ordinary Stocks (i) in India (ii) out of India | |
| Other Debentures and De- benture Stock of Com- panies incorporated (i) in India (ii) out of India | |
| Other guaranteed and Pre- ference Stocks and Shares of Companies incorporated (i) in India (ii) out of In- dia | |
| Other Ordinary Stocks and Shares of Companies in- corporated (i) in India (ii) out of India | |
| Holdings in Subsidiary Com- panies (f) | |
| House property (i) in India (ii) out of India | |
| Freehold and Leasehold ground rents and rent charges | |
| Agent's Balances | |
| Outstanding Premiums (g) Interest, Dividends and Rents outstanding (d) | |
| Carried over | |

Notes.

- (a) The Reserves or Contingency Accounts must be separately stated.
- (b) If the insurer has not full and unrestricted control of the assets constituting the Pension or Superannuation Accounts, either those Accounts and the assets and liabilities relating thereto must be omitted from the balance-sheet or the assets of which the insurer has not such control must be clearly indicated on the face of the balance-sheet.
- (c) If the insurer has deposited securities as cover in respect of any of these items, the amount and nature of the securities so deposited must be clearly indicated on the face of the balance-sheet.
- (d) These items are or have been included in the corresponding items in the Revenue or Profit and Loss Account. Outstanding and accruing interest, dividends and rents must be shown after deduction of income-tax or the income-tax must be provided for amongst the liabilities on the other side of the balance-sheet.
- (e) Such items as amount of liability in respect of bills discounted, uncalled capital of subsidiary companies, uncalled capital of other investments, etc., must either be shown in their several categories under the heading "Contingent Liabilities" or the appropriate items on the assets side must be set out in such detail as will clearly indicate the amount of the uncalled capital.
- (f) As respects life and annuity business full particulars of holdings in and loans to subsidiary companies must be stated, giving the name of each company, the number and description of each class of shares held, the amounts paid up thereon, and the value at which the holdings in each company stand in the balance-sheet.
- (g) Either this item must be shown net or the commission must be provided for amongst the liabilities on the other side of the balance-sheet.
- (h) The aggregate amount owing by a subsidiary company or subsidiary companies is to be shown separately from all other assets and the aggregate amount owing to a subsidiary company or subsidiary companies is to be shown separately from all other liabilities.
- (i) Amounts due from directors and officers must be shown separately.
- (j) No amounts must be entered under this heading unless fully secured. If not fully secured, the amounts must be included under the heading "Sundry Debtors."
- (k) Under this heading must be included such items as the following, which must be shown under separate heading suitably described: office furniture, goodwill, preliminary, formation and organisation expenses, development expenditure account, discount on debentures issued, other expenditure carried forward to be written off in future years, balance being loss on Profit and Loss Appropriation Accounts, etc. The amounts included in the balance-sheet must not be in excess of cost.
- (l) Under the head "Other accounts, if any (to be specified)" on the left hand side, fines realized from the staff and their contribution towards the provident fund, if any, should be shown under separate sub heads.

FORM AA.

Classified Summary of the Indian Assets of the
Company on

19

| Class of Asset. | Book value as per (b) below. | Market- value as per (b) below. | Remarks as per (c) below. |
|---|---------------------------------------|--|---------------------------------|
| ----- | Rs | Rs | ---- |
| (1) Government of India Securities | | | |
| (2) Indian Provincial Government Securities | | | |
| (3) Indian Municipal Port and Improvement Trust Securities including Debentures | | | |
| (4) Debentures of Indian Railways | | | |
| (5) Guaranteed and Preference Shares of Indian Railways | | | |
| (6) Annuities of Indian Railways | | | |
| (7) Ordinary Shares of Railways in India | | | |
| (8) Other Debentures of concerns in India | | | |
| (9) Other Guaranteed and Preference Shares of concerns in India | | | |
| (10) Other Ordinary Shares of concerns in India | | | |
| (11) Loans on the Company's policies effected in India and within their surrender value | | | |
| (12) Loans on Mortgage of property in India | | | |
| (13) Loans on Personal Security to persons domiciled and resident in India | | | |
| (14) Other loans granted in India (particulars to be stated) | | | |
| (15) Land and House Property in India | | | |
| (16) Cash on Deposit in banks in India | | | |
| (17) Cash in Hand and on current account in banks in India | | | |
| (18) Agents' balances and outstanding premiums | | | |

FORM AA—Contd.

| Class of Asset | Book value as per (a) below Rs | Market value as per (b) below Rs | Remarks as per (c) below |
|--|-----------------------------------|-------------------------------------|--------------------------|
| (19) Interest, dividends and rents either outstanding or accrued but not due | | | |
| (20) Other assets in India (to be specified) | | | |

The statement shall show—

- the value for which credit is taken in the balance sheet for each of the above mentioned classes of assets
- the market value of such of the above mentioned classes of assets as has been ascertained from published quotations after deduction of accrued interest included in market prices in those cases where accrued interest is included elsewhere in the balance sheet,
- how the value of such of the above mentioned classes of assets as has not been ascertained from published quotations has been arrived at and
- the rates of exchange at which the values of the assets other than in rupee currency have been converted into rupees

The market values need not be shown separately when they are not less than the book values and a certificate to that effect is appended to the statement

No amounts on account of any of the following items may be entered into the statement —

- Goodwill
- Preliminary formation organisation or development expenses
- Commission or discount on shares or debentures issued
- Commuted Commission
- Expenditure carried forward to be written off in future years

THE SECOND SCHEDULE

(See section 11)

Regulations and Forms for the preparation of Profit and Loss Accounts
PART I

Regulations

1 The items on the income side of the Profit and Loss Account and Profit and Loss Appropriation Account must relate to income whether actually received or not and the items on the expenditure side must relate to expenditure whether actually paid or not.

2 Deductions from Interest Dividends and Rents to be shown in respect of income tax must include all amounts in respect of British Indian income tax whether or not it has been or is to be deducted at source or paid direct.

3 The Interest, Dividends and Rents, less income tax thereon shown in the Revenue Accounts for any classes of business other than life insurance business including annuity business may, if the insurer so desires, be included with the corresponding items in the Profit and Loss Account.

PART II.
FORM B.

Form of Profit and Loss Account
Profit and Loss Account of for the year ended 19

| | Rs. A. P. | | Rs. A. P. |
|---|-----------|---|-----------|
| British India Taxes on the Insurer's Profits (not applicable to any particular Fund or Account) | | Interest, Dividends and Rents (not applicable to any particular Fund or Account) | Rs. |
| | | Less—Income-tax thereon | Rs. |
| Expenses of Management (not applicable to any particular Fund or Account)* | | Profit on realisation of Investments (not credited to Reserves or any particular Fund or Account) | |
| Loss on Realisation of Investments (not charged to Reserves of any particular Fund or Account) | | Appreciation of Investments (not credited to Reserves or any particular Fund or Account) | |
| Depreciation of Investments (not charged to Reserves or any particular Fund or Account) | | Profit transferred from Revenue Accounts (details to be given) | |
| Loss transferred from Revenue Accounts (details to be given) | | Transfer Fees | |
| Other Expenditure (to be specified) | | Other Income (to be specified) | |
| Balance for the year carried to Appropriation Account | | Balance being loss for the year carried to Appropriation Account | |

* If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount must be shown separately

FORM C.

Form of Profit and Loss Appropriation Account.

Profit and Loss Appropriation Account of _____ for the year ended 19 .

| | Rs. A. P. | | Rs. A. P. |
|--|-----------|---|-----------|
| Balance being loss brought forward from last year. | | Balance brought forward from last year | Rs. |
| Balance being loss for the year brought from Profit and Loss Account (as in Form B) | | Less—Dividends since paid in respect of last year (to be specified and if "free of tax" to be so stated)* | Rs |
| Dividends paid during the year on account of the current year (to be specified and if "free of tax" to be so stated) | | | |
| Transfers to any particular Funds or Accounts (details to be given) | | Balance for the year brought from Profit and Loss Account (as in Form B) | |
| Balance at end of the year as shown in the Balance-Sheet | | Balance being loss at end of the year as shown in the Balance Sheet | |

* Note.—This item may be shown on the other side of the account if preferred.

THE THIRD SCHEDULE.

(See section 11.)

Regulations and Forms for the preparation of Revenue Accounts.

PART I.

Regulations.

1. Form D is, as set out in Part II of this Schedule, appropriate for life insurance business, but a separate revenue account must be prepared for every class of business in respect of which the insurer is required to maintain a separate account.

2. Form F is, as set out in Part II of this Schedule, appropriate for fire insurance business. A separate revenue account in the same form must be prepared for accident and miscellaneous insurance including workmen's compensation and motor car insurance. Form E is, as set out in Part II of this Schedule, appropriate for marine insurance business.

3. If any combined revenue account is for any purpose issued by an insurer it must be in accordance with the forms specified in this Schedule and must clearly show on the face thereof that it is a combined revenue account, and must set out fully the name of every insurer required to make separate returns under this Act whose revenue and expenditure have been included therein; if the revenue and expenditure of any person not being an insurer are included in a combined revenue account, the fact must be stated thereon.

4. The items on the income side of the revenue account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

5. Re-insurance premiums, whether on business ceded or accepted, are to be brought into account gross (*i.e.*, before deducting commissions) under the head of premiums.

6. As respects life insurance business the following statements shall be furnished to the Superintendent of Insurance every year showing details provided for in a Form pertaining thereto:—

(A) A statement in form DD as set forth in Part II of this Schedule.

(B) A statement in form DDD as set forth in Part II of this Schedule.

(C) A statement in form DDDD as set forth in Part II of this Schedule.

7. The following information shall be supplied in addition to the revenue account, namely, the gross premium written in India for life, fire, marine and accident and miscellaneous insurance business.

8. Any office premises which form part of the assets of a life insurance fund must be treated as an interest earning investment, and accordingly, in the revenue account for life insurance business a fair rent for the premises must be included under the heading "Interest, Dividends and Rents" and in the revenue account for every class of business for which the premises are used, proper charges for the use thereof must be included under the heading "Expenses of Management."

9 Where an insurer carries on the business of life insurance in conjunction with any other class of insurance business the expenses of management charged to the life insurance revenue account must not include more than a reasonable proportion of the common expenses and in particular no such account must be charged with more than a fair sum for the use of any office premises having regard to the income from the various classes of business carried on and to the extent to which the premises are used for the purposes of each class of business

10 Deductions from Interest Dividends and Rents in respect of income tax must include all income tax charged on such income whether or not it has been or is to be deducted at source or paid direct, the income-tax to be shown as so deducted in the life insurance Revenue Account is British Indian, United Kingdom, Foreign and Dominion income tax, but the income-tax to be shown as deducted in Revenue Accounts of any other classes of business is British Indian income tax only

Form of Revenue Accounts applicable to Life Insurance Business.

[illegible]

| Expenses of Management (b)— | Loss transferred to Profit and Loss Account Transferred from Appropria- tion Account |
|--|---|
| 1. Commission and allow- ances | |
| 2. Salaries, etc. (other than to agents and those con- tained in item No. 1) | |
| 3. Travelling expenses | |
| 4. Directors' fees | |
| 5. Auditors' fees | |
| 6. Law charges | |
| 7. Advertisements | |
| 8. Printing and Stationery | |
| 9. Other expenses of ma- nagement (accounts to be specified) | |
| 10. Other payments (accounts to be specified) | |
| 11. Rents for offices belong- ing to and occupied by the insurer | |
| 12. Rents of other offices occupied by the insurer | |
| Bad Debts United Kingdom, British Indian, Dominion and For- eign Taxes | |
| Other Expenditure (to be specified) | |
| Profit transferred to Profit and Loss Account Balance of Fund at the end of the year as shown in the Balance-Sheet | |

Notes.

(a) In the case of an insurer having his head office in British India these columns apply only to business the premiums in respect of which are payable outside India.

(b) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately. Under this item the salary paid to the managing agent or managing director shall be shown separately from the total amount paid as salaries to the remaining staff.

(c) All single premiums for annuities, whether immediate or deferred must be included under this heading.

(d) British Indian, United Kingdom, Foreign and Dominion income tax on Interest Dividends and Rents must be shown under this heading less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British India, Foreign and Dominion taxes, other than those shown under this item.

(e) Under the head "Other Income" fines, if any, realised from the staff, must be shown separately. All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside British India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

(f) In the case of an insurer having his principal place of business outside British India the expenses of management for business out of India and total business need not be split up into the several sub-heads if they are not so split up in his own country.

Audit :

The balance sheet, profit and loss account, Revenue Account and profit and loss appropriation account of every Indian Company or every insurer having his place of business or domicile in British India, in respect of all insurance business transacted by it or him, and of every non-Indian insurer, in respect of the insurance business transacted by him in India, must be audited annually by an auditor unless in the case of an Indian Company, it is already subject to audit under the Indian Companies Act, 1913. The auditor is to have the same rights and liabilities as provided for in S. 145 of the Indian Companies Act¹.

Actuarial Report and Abstract :

Every insurer carrying on life insurance business must, once at least in every five years, cause an investigation to be made by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations and requirements contained in Parts I and II of the Fourth Schedule to the Act. Such abstract must be accompanied by a certificate signed by the principal officer of the insurer that full and accurate particulars of every policy under which there is a liability, actual or contingent, have been furnished to the actuary for the purpose of investigation. The valuation report of the actuary must also specify the life insurance business in force at the date. The investigation and valuation must relate to the whole of the life insurance business in the case of Indian Companies or insurers having their principal place of business or domicile in India and to the life insurance business transacted in India in the case of insurers having their principal place of business or domicile outside India.²

Every abstract prepared by the actuary must contain a certificate by the actuary that he has satisfied himself as to the accuracy of the valuations made and must show the following amongst others :—

- (i) the valuation date ;

¹ Insurance Act, 1938, S. 12.

² Insurance Act, 1938, S. 13.

- (ii) the general principles and full details of the methods adopted in the valuation of each of the various classes of insurance including statements as to whether the principles were determined by the instruments constituting the company or by its regulations or bye laws or how otherwise, the method by which the net premiums have been arrived at and how the ages at entry, premium terms and maturity dates have been treated and so on.
- (iii) the table of mortality used, and the rate of interest assumed in the valuation
- (iv) the basis adopted in the distribution of profits as between the insurer and policy-holders.
- (v) the general principles adopted in the distribution of profits among policy-holders.

Submission of Returns :

The audited account and statements in balance sheet, profit and loss account and revenue account and the actuarial report and abstract referred to above must be printed and five copies thereof must be furnished as returns to the Superintendent of Insurance within six months from the end of the period to which they refer. The period may be extended by the Superintendent of Insurance in the case of the furnishing of actuarial abstract and also in the case of insurers having their principal place of business or domicile outside British India or Indian insurers doing business outside India¹. Of the four copies so furnished one must be signed in the case of a company by the Chairman and two directors and by the principal officer of the company and, if the company has a managing director or managing agent, by that director or managing agent, and, in the case of a firm, by two partners of the firm, and, in the case of an insurer being an individual, by the insurer himself².

Where an insurance company incorporated in India furnishes its accounts and balance sheet to the Superintendent of Insurance in the manner referred to above, it need not file its balance sheet with the Registrar of Joint Stock Companies of the province under S. 134 of the Indian Companies Act and it will be sufficient com-

¹ Insurance Act, 1938, S. 15 (1).

² Insurance Act, 1938, S. 15 (2).

pliance with the Indian Companies Act if it sends to the Registrar a copy of the accounts and balance sheet furnished to the Superintendent of Insurance.

Every insurer must also submit to the Superintendent a certified copy of every report on the affairs of the concern which is submitted to the members or policy-holders and if it is a company incorporated in India, it must also submit to the Superintendent an abstract of the proceedings of every general meeting within thirty days from the holding of the meeting to which it relates¹.

Requirements of Returns for Foreign Companies :

Where a foreign insurer carrying on business in India is required by the law of the country in which he or it is constituted, incorporated or domiciled to prepare and to furnish to a public authority of that country documents of substantially the same nature as the balance sheet, profit and loss account, Revenue Account and actuarial report and abstract, such insurer is not required to prepare such accounts, statements and abstracts according to the Indian law and the provisions of the Act will be sufficiently complied with if such insurer furnishes to the Superintendent of Insurance four certified copies in the English Language of every balance sheet, account, abstract, report and statement supplied to the public authority of his or its own country according to its law within six months from the end of the period to which such documents refer together with the following statements, namely :—².

- (a) a statement showing the assets held by the Insurer in India.
- (b) revenue account showing each class of business transacted by it in India.
- (c) an abstract of the valuation report in respect of all life insurance business transacted by the insurer in India.
- (d) A declaration in the prescribed form stating that all amounts received by the insurer have been shown in the revenue account except such sums as properly appertain to the capital account.

Custody and Inspection of Documents and Supply of Copies :

Every return furnished to the Superintendent of Insurance of

¹ Ibid, Ss. 18 and 19.

² Ibid, S. 20 (2).

a certified copy thereof is to be kept by the Superintendent and to be kept open for inspection ; and any person may procure a copy of any such return, or of any part thereof, on payment of a fee of six annas for every hundred words¹.

Every insurer must supply within fourteen days a printed or certified copy of the accounts, statements and abstract, furnished to the Superintendent under the Act, on the application of any share-holder or Policy-holder made at any time within two years from the date on which the document was so furnished, when the insurer is constituted, incorporated or domiciled in British India and in any other case within one month of such application²

Superintendent of Insurance, his powers and duties :

Superintendent of Insurance is the Officer, who is a qualified actuary, appointed by the Central Government to perform the duties of the Superintendent of Insurance under the Insurance Act, 1938;³ The control and supervision of insurance companies by the Central Government is exercised through the Superintendent of Insurance and the machinery of Control which the Act has provided for makes the Superintendent the most important figure in the whole scheme of the Act. In fact the shadow of the Superintendent looms over every sphere of insurance companies sought to be controlled and supervised by the Act. His powers and duties may be enumerated as follows —

- “ (a) He grants the certificate of registration to an insurer. The application for registration is to be made to him and he sees whether the requirements of the Act have been satisfied before he grants the certificate. He has the power to cancel or withhold registration subject to his decisions being appealed against to the Court
- (b) The certified copies, audited balance sheet, profit and loss account, revenue account and the actuarial report and abstract of every insurer is to be furnished to the Superintendent within a prescribed time. If it appears

¹ Insurance Act 1938, S. 20 (1)

² Ibid, S. 20 (2)

³ Ibid, S. 2 (15)

to the Superintendent that any return so furnished is inaccurate or defective in any respect, he may¹

- (i) require from the insurer such further information, certified if he so directs by an auditor or actuary as he may consider necessary to correct or supplement such return ;
- (ii) Call upon the insurer to submit for his examination at the principal place of business of the insurer in British India any book of account, register or other document or to supply any statement which he may specify in a notice served on the insurer for the purpose ;
- (iii) examine any officer of the insurer on oath in relation to the return ;
- (iv) decline to accept any such return unless the deficiency has been supplied before the expiry of one month from the date on which the requisition for correcting the inaccuracy or supplying the deficiency was delivered to the insurer and on his declining to accept such return the insurer is to be deemed to have failed to comply with the provisions of the Act.

The decision of the Superintendent as regards declining to accept any return is subject to appeal to the Court².

- (c) If it appears to the Superintendent that an investigation and valuation of the business of an insurer by an actuary does not properly indicate the condition of the affairs of the insurer by reason of the faulty basis adopted in the valuation, he may, after giving notice to the insurer and giving him an opportunity to be heard, cause an investigation and valuation to be made at the expense of the insurer by an actuary appointed by the insurer for this purpose and approved by the Superintendent.

- (d) If the Superintendent has reason to believe that the interests of the policy-holders of an insurer are in danger

¹ Insurance Act, 1938. S. 21 (1).

² Ibid, S. 21 (2).

or that an insurer is unable to meet his obligations or has made default in complying with any of the provisions of the Act, or that an offence under the Act has been or is likely to be committed by an insurer or any of his officers or if he receives a requisition in this behalf signed by the shareholders of an insurance company not less in number than one tenth of the whole body of shareholders and holding not less than one tenth of the whole share capital or if he receives a requisition in this behalf signed by not less than fifty policyholders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than Rs. 50,000/- and supported by an affidavit, he may, after giving notice to the insurer and giving him an opportunity of being heard, appoint an auditor or actuary or both, not being an auditor or actuary in the employ of the insurer, to investigate the affairs of the insurer, and may himself make such investigation. The Superintendent may require the insurer to comply within a specified time with any directions he may issue to remedy the defects disclosed by such investigation. If the insurer fails to comply with such direction or if as a result of the investigation the Superintendent is of opinion that the business of the insurer should be wound up in the interests of the Policy-holders, the Superintendent may, after giving notice to the insurer and giving him an opportunity of being heard, apply to the court to have the business of the insurer wound up¹.

- (e) The Superintendent has the power to prosecute insurers or where the insurer is a company its directors or principal officers for non-compliance with the provisions of the Act².
- (f) The Superintendent may take such steps as he may consider necessary to inspect and verify that the assets of an insurer are invested as required by the Act.

Register of Policies and Claims :

An insurer who has his principal place of business or domicile

¹ Insurance Act, S. 33 (1), (4) and (5).

² Ibid, S. 107.

in British India or a company incorporated in India must, in respect of all insurance business, and an insurer incorporated or constituted outside British India must, in respect of the insurance business transacted by him in India, maintain (a) a register of policies and (b) a register of claims¹. In a register or record of policies must be entered in respect of every policy issued by the insurer, the name and address of the Policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice². In a register or record of claims must be entered every claim made together with the date of the claim, the name and address of the claimant and the date on which the claim was discharged, or in the case of a claim which is rejected, the date of rejection and the grounds therefor³.

Investments :

Every insurer incorporated in or domiciled in India or the United Kingdom must invest and hold invested assets to the extent of fifty-five per cent of the sum of his total liabilities to the holders of life insurance policies in India, representing matured claims and claims to mature, less the amount deposited by it with the Reserve Bank of India in accordance with the provisions of the Act and the amount lent by him to policy-holders on policies of life-insurance, in the following manner⁴.

- (a) Twenty five per cent of such total liabilities in Government Securities, and
- (b) Thirty per cent of such total liabilities in Government securities or other approved securities or securities of or guaranteed by the Government of the United Kingdom.

But an insurer incorporated or domiciled elsewhere than in British India or the United Kingdom and an insurer incorporated in British India whose share capital to the extent of one-third is owned by, or the members of whose governing body to the extent of one-third consists of, individuals domiciled elsewhere than in British India or the United Kingdom, must invest and hold invested assets to the whole extent of the sum of his total liabilities to

¹ Ibid, S. 14.

² Ibid, S. 14.

³ Ibid, S. 14.

⁴ Insurance Act, 1938, S. 27 (1).

holders of life insurance policies in India on account of matured claims and claims to mature less the amount of his deposit and any amount due to him on loans granted by him on policies of life insurance, in the following manner¹ :—

- (a) Thirty-three and one third per cent of such total liabilities in Government securities, and
- (b) the balance of such total liabilities in Government securities or other approved securities or securities of or guaranteed by the Government of the United Kingdom.

Every insurer carrying on business at the commencement of the Act must invest his assets in the above manner within four years from the commencement of the Act².

Every insurer other than provident society registered under the Act and carrying on the business of life insurance, is required, twice in every year, namely within fourteen days of the 30th of June and 31st of December respectively, to submit to the Superintendent of Insurance a statement certified by the principal officer of the insurer showing as at the said dates the assets held invested in accordance with the above provisions.³ The Superintendent can at any time take proper steps to verify and inspect the assets invested in the manner required by the Act and the insurer must comply with all requisitions made by the Superintendent in that behalf⁴.

Prohibition of Loans :

No insurer can grant loans or temporary advances to (a) any director, managing agent, manager, auditor, actuary or officer of the insurer where the insurer is a company or (b) to any partner of the insurer where the insurer is a partnership or (c) to any other company or firm, excepting a banking concern in which any such director, manager, managing agent, actuary, officer or partner holds the positions of a director, manager, managing agent, actuary, officer or partner, either on hypothecation of property or on personal security or otherwise excepting where the loan or advance is given on life policies issued by the insurer to the extent of the

¹ Ibid, S. 27 (2).

² Insurance Act, S. 27 (3).

³ Insurance Act, S. 28 (1).

⁴ Ibid, S. 28 (2).

surrender value of such policies¹. In the case of loans to such specified persons as in (a) and (b) existing at the commencement of the Act, such loans must have been repaid within one year from the commencement of the Act and in case of default such defaulting director, manager, managing agent, auditor, actuary, officer or partner shall cease to hold office on the expiry of such one year.

Limitation on Employment of Managing Agents :

The Insurance Act, 1938, prohibits the appointment of a managing agent for the conduct of the business of an insurer.² If an insurer is a company which was engaged in the business of insurance before the commencement of the Act and employed a managing agent for the conduct of its business, then such managing agent shall cease to hold office on the expiry of three years from the commencement of the Act, notwithstanding anything contained in the Indian Companies Act, 1913, or in the memorandum and articles of the insurer or in the agreement with the managing agent, and such managing agent shall not be entitled to claim any compensation from the insurer for the premature termination of his employment³. The insurer must not pay and such managing agent must not accept as remuneration more than Rs. 2000/- per month in all, including all salary, commission and other remuneration payable to the managing agent, during the three years after the commencement of the Act during which the managing agent will be able to function⁴.

Amalgamation and Transfer of Insurance Business :

No life insurance business excepting an insurer constituted, domiciled or incorporated outside British India, can be transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared and sanctioned by the Court having jurisdiction over one or other of the insurers concerned in the following manner⁵.

- (a) The scheme must set out the agreement under which the transfer or amalgamation is proposed to be effected.

¹ Insurance Act, 1938, S. 29.

² Insurance Act, 1938, S. 32 (1)

³ Ibid, S. 32 (2).

⁴ Insurance Act, 1938, S. 32 (3).

⁵ Ibid, S. 35 (1).

and shall contain such further provisions as may be necessary for giving effect to the scheme.

- (b) After the scheme is prepared and before any application may be made to the Court for its sanction, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reasons therefor must, at least two months before the application is made, be sent to the Central Government together with certified copies of the following documents :—
- (i) a draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer ;
 - (ii) Statements of the assets and liabilities of the insurers concerned in such amalgamation or transfer ; and
 - (iii) the actuarial or other reports on which the scheme was founded including a report by an independent actuary on the proposed amalgamation or transfer.

These documents are to be kept open for inspection of the members and policy-holders at the principal and branch offices and Chief agencies of the insurers concerned during the two months before the application is made.

- (c) After the expiry of two months the application may be made to any of two courts mentioned above. The Court, if it so directs, shall cause notice of the application to be sent to every holder of a life policy of the insurers concerned and a statement of the nature of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as it may direct and after hearing the directors and such Policy-holders or other persons as may apply or are entitled to be heard, may sanction the arrangement, if it is satisfied that no sufficient objection to the arrangement has been established¹.

Statements required after amalgamation or transfer :

In the case of every amalgamation or transfer whether in accordance with the provisions of the Act which applies to Indian insurers only or otherwise, the insurer carrying on the amalga-

¹ Ibid. S. 36.

ted business or to whom the business has been transferred must, within three months from the completion of the amalgamation or transfer, furnish to the Central Government.¹

- (a) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and
- (b) a declaration signed by every insurer concerned or in the case of a company by the Chairman or the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is fully set forth in the declaration, and
- (c) where the amalgamation or transfer has not been made in accordance with a scheme confirmed by the Court *e.g.*, where the amalgamation or transfer is between non-Indian insurers—
 - (i) certified copies of statements of the assets and liabilities of the insurers concerned, and
 - (ii) certified copies of the actuarial or other reports upon which the agreement or deed was founded.

Assignment or transfer of Policies :

We have dealt with this subject already under Life Insurance.

Nomination by Policy-holder :

The holder of a policy may at the time of effecting the policy or at any time before the policy matures for payment, nominate a person or persons to whom the money secured by the policy shall be paid in the event of his death. Such nomination to be valid must be either incorporated in the text of the policy itself or be made by an endorsement on the policy, communicated to the insurer and registered by him in the records relating to the policy. The insurer may charge a fee not exceeding Re. 1/- for registering any such endorsement. But any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or further endorsement or a will as the case may be and ceases to have effect automatically on an assignment or transfer of the Policy. The nominee has no claim

¹ Insurance Act, 1938, S. 37.

to the money payable under the Policy if the policy-holder is alive when the policy matures for payment. If the nominee is not alive at the time of the death of the policy-holder, the heirs or legal representative of the policy-holder and not of the nominee becomes entitled to the insurance money¹.

Licensing of Insurance Agents :

Any person not suffering from the disqualifications mentioned below may obtain a license to act as an insurance agent for the purpose of soliciting or procuring insurance business from the Superintendent of Insurance or an officer authorised by him in this behalf on payment of a fee not exceeding Re. 1/-.² A license issued under the provisions of the Act entitles the holder to act as an insurance agent for any registered insurer³. Any individual acting as an insurance agent without holding a license is punishable with fine extending to Rs. 50 - and any insurer or any one acting on behalf of such insurer who appoints as an insurance agent any individual not so licensed, or transacts any insurance business through any such individual, is punishable with fine extending to Rs. 100/-⁴. The disqualifications referred to above are as follows :⁵

- (a) that the person is a minor ;
- (b) that he is found to be of unsound mind by a competent Court ;
- (c) that he has been found by a competent court guilty of criminal misappropriation or criminal breach of trust or cheating ;
- (d) that in the course of any judicial proceeding relating to any policy or the winding up of an insurance company or in the course of an investigation of the affairs of an insurer it has been found that he is guilty of or has knowingly participated in or connived at any fraud, dishonesty or misrepresentation against an insurer or an assured.

A license issued under the Act expires on 31st March every

¹ Insurance Act, 1938. S. 39 (1), (2), (3), (4), (5) & (6).

² Ibid, S. 42 (1).

³ Ibid, S. 42 (2).

⁴ Ibid, S. 43 (2).

⁵ Ibid, S. 42 (4).

year and must be renewed from year to year on payment of a fee of Re. 1/- unless the holder is in the meantime disqualified¹. If after the grant of a license it is found that the holder suffers from any of the disqualifications mentioned above the Superintendent of Insurance must cancel the license. Where an agent knowingly contravenes any provision of the Act the Superintendent may cancel his license.

Register of Insurance Agents :

Every insurer and every person who acting on behalf of an insurer employs licensed insurance agents shall maintain a register showing the name and address of every licensed insurance agent appointed by him and the date on which his appointment began and the date, if any, on which his appointment ceased¹.

Commission :

No person can pay or contract to pay, after six months from the commencement of the Act, any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person who is not a licensed agent⁴. The remuneration for licensed agents has been laid down as follows⁵ —

- (a) no insurer can pay or contract to pay any licensed agent as commission or remuneration in amount exceeding, in the case of life Insurance business, forty per cent of the first year's premium payable on any policy or policies effected through him and five per cent of a renewal premium, or, in the case of business of any other class, fifteen per cent of the premium
- (b) But insurers, in respect of life insurance business only, may pay, during the first ten years of their business to their insurance agents fifty five per cent of the first year's premium payable on any policy or policies effected through them and six per cent of the renewal premiums
- (c) No insurer can forfeit or stop payment of renewal

¹ Insurance Act, 1938 S. 42 (3)

² Ibid, S. 42 (5)

³ Ibid, S. 43 (1)

⁴ Ibid, S. 40 (1)

⁵ Ibid, S. 40 (2)

commission due to an agent whose employment may have terminated under any agreement by reason only of such termination provided the agent has served him continually and exclusively for ten years and does not work for any other insurer¹.

Rebates :

No person is permitted to allow or offer to allow to any other person, as any inducement to effect or renew a policy, any rebate of the whole or part of the commission payable or any rebate of the premium shown in the policy except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer, nor is any person taking out or renewing a policy allowed to accept such a rebate. A person offering or allowing such rebate is punishable with fine which may extend to Rs. 100/- and any person accepting such an offer or rebate is punishable with fine which may extend to Rs. 50/-².

Special Provisions for Policy-holders :

Avoidance of the Policy :

An insurer cannot question or avoid a policy, if effected prior to the commencement of the Act, after the expiry of two years from such commencement and, if effected after the commencement of the Act, after the expiry of two years from the date on which it was effected, on the ground of any inaccurate or false statement made in the proposal, or in any report of a medical officer or referee or friend of the insured, or in any other document leading to the issue of the policy unless the insurer can show that such statement was on a material matter and deliberately and fraudulently made by policy-holder knowing it to be false,³

Application of British Indian Law :

The holder of a policy issued by a non-Indian insurer in respect of business transacted in British India has, after the commencement of the act, the right to receive payment of the money secured by the policy in British India, notwithstanding any agree-

¹ Insurance Act, 1938, S. 44.

² Ibid, S. 41 (1) & (2).

³ Ibid, S. 45.

ment to the contrary, and to sue for relief in respect of the policy in any competent Court in British India and in any such suit the law of British India would be applicable¹.

Payment of money into court :

Where due to conflicting claims in respect of a policy which has matured for payment of insufficiency of proof of title to the amount secured thereby or for any other reason the insurer is unable to ascertain who amongst the claimants has the real title and can give a valid discharge to the insurer, the insurer must, before the expiry of nine months from the date of the maturity of the policy and in the case of death of the assured after six months from such death, apply to the court, within whose jurisdiction the place at which the payment is to be made is situate, to pay the money into court. The application for permission to pay into court must be made by a petition verified by an affidavit signed by a principal officer of the insurer setting forth the following particulars, namely :—

- (a) the name of the insured person and his address ;
- (b) if the insured is deceased, the date and place of his death ;
- (c) the nature of the policy and the amount secured by it ;
- (d) the name and address of each claimant so far as is known to the insurer with details of every notice of claim received ;
- (e) the address at which the insurer may be served with notice of any proceeding relating to disposal of the amount paid into court.

If, on such application, it appears to the Court that a satisfactory discharge for the payment of the amount cannot otherwise be obtained by the insurer it must allow the money to be paid into Court and invest the amount in Government securities pending its disposal. On the money being paid the Court will give notice of the same to every ascertained claimant. If any claimant applies to withdraw the money the Court must cause notice of the same to be given to every other ascertained claimant at the cost of the claimant so applying and on such notice being

¹ Insurance Act, 1938, S. 46.

given the Court adjudicates on the rival claims and disposes of the amount accordingly¹.

Directions of Insurance Companies :

Where the insurer is a company incorporated under the Indian companies Act, 1913, and carries on the business of life insurance, not less than one fourth of the whole number of the directors of the company must be elected by the holders of policies of life insurance from amongst holders of policies of life insurance having the qualifications prescribed by the articles of the company².

Restrictions on Dividends and Bonuses :

No insurer constituted, incorporated or domiciled in British India carrying on the business of life insurance shall in respect of such life insurance business declare or pay any dividend to shareholders or any bonus to policy-holders except out of a surplus ascertained as the result of an actuarial valuation of the assets and liabilities of the insurer³.

Prohibition of business on dividing principle :

No insurer shall after the commencement of the Act begin or in the case of existing companies continue to carry on after three years from that date, any business upon the dividing principle, that is to say, on the principle that the sum secured by the policy is not fixed but depends either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits. This, of course, does not prevent an insurer from declaring and paying variable amounts as bonuses in addition to the sum secured by the policy based on a periodical actuarial valuation. During the three years after the commencement of the Act when an existing insurer may continue business on dividing principle the insurer must withhold from distribution a sum not less than forty per cent of the premiums received during each year after the commencement of the Act and invest the same so as to make up the amount required for investment under the Act⁴.

¹ Insurance Act, 1937, S. 47.

² Ibid, S. 48.

³ Ibid, S. 49.

⁴ Insurance Act, 1938, S. 52.

Notice of Options :

When a policy lapses the insurer must, within three months of the lapsing, give notice to the policy holder informing him of the options available to him¹

Supply of Copies of Proposals and Medical Reports :

Every insurer must, on application by a policy holder and on payment of a fee not exceeding one rupee, supply to the policy holder certified copies of the questions put to him and his answers thereto contained in his proposal for insurance and in the medical report supplied in connection therewith-

Surrender Value :

This subject has already been dealt with

Special Provisions relating to external companies :

If any special requirement is to keeping of deposits or assets is imposed on Indian Companies by any country as a condition of carrying on insurance business in that country and no such requirement is imposed on insurers constituted, incorporated or domiciled in such other country under the Act, then the Central Government if satisfied of the existence of such discriminatory requirements on Indian Companies in such other country, by notification in the Official gazette, direct the same or similar requirements to be imposed upon insurers of such other country as a condition of carrying on the business of insurance in British India

Every insurer having his principal place of business or domicile outside British India, who establishes a place of business within British India or appoints a representative in British India with the object of obtaining insurance business, must, within three months from the establishment of such place of business or the appointment of such agent, file with the Superintendent of Insurance, the following particulars —

(a) a certified copy of the Charter, statutes, deeds of settle-

¹ Ibid, S. 50

² Ibid, S. 51

³ Ibid, S. 62

- ment, or memorandum and articles or other instrument constituting or defining the constitution of the insurer, and, if the instrument is not in the English language, a certified translation thereof ;
- (b) a list of the directors, if the insurer is a company ;
 - (c) the name and address of some one or more persons resident in British India authorised to accept on behalf of the insurer service of process and any notice required to be served on the insurer, together with a copy of the power of attorney granted to him ;
 - (d) the full address of the principal office of the insurer in British India ;
 - (e) a statement of the classes of insurance business to be carried on by the insurer ; and
 - (f) a statement verified by an affidavit setting forth the special requirements, if any, to which Indian Companies are subject as a condition of carrying on insurance business in his country.

If there is any alteration in any of the above particulars at any time the insurer must furnish to the Superintendent of Insurance particulars of such alteration forthwith.

Every insurer having his principal place of business or domicile¹ outside British India must keep at his principal office in British India such books of account, registers and documents as will enable the accounts, statements, and abstracts which he is required under the Act to furnish to the Superintendent of Insurance, in respect of the insurance business transacted by him in India, to be completed and, if necessary, checked by the Superintendent.

Winding up :

The Court may order the winding up of an insurance company on all the grounds set out in Ss. 161 and 163 of the Indian Companies Act. In addition to these grounds the Court may order the winding up of an insurance company under the Act on the following grounds¹:—

- (a) If with the sanction of the Court previously obtained a petition is presented by not less than one tenth of

¹ Insurance Act, 1938, S. 53.

all the shareholders holding not less than one tenth of the whole share capital or by not less than fifty policy-holders holding policies which have been in force for not less than three years and are of the total value of not less than Rs. 50,000/-; or

(b) If the Superintendent of Insurance, who is authorised to do so, applies in this behalf to the Court on any of the following grounds, namely—

- (i) that the company has failed to deposit or to keep deposited with the Reserve Bank the amounts required by S 7, or S 98 of the Insurance Act ;
- (ii) that the company has failed to comply with any requirement of the Insurance Act and has continued such failure for a period of three months after notice of such failure has been conveyed to the company by the Superintendent of Insurance ;
- (iii) that it appears from the returns furnished under the provisions of the Act or from the results of any investigation made thereunder that the company is insolvent , or
- (iv) that the continuance of the company is prejudicial to the interests of the policy-holders

An insurance company cannot be wound up voluntarily except for the purpose of effecting an amalgamation or a reconstruction of the company, or on the ground that by reason of its liabilities it cannot continue its business¹

Winding up of Secondary Companies :

When the insurance business or any part thereof of an insurance company is transferred to another insurance company under any arrangement the transferor company is known as the "Secondary Company" and the transferee company is known as the "principal company". If the principal company is being wound up by or under the supervision of the Court, the Court must also order the secondary company to be wound up in conjunction with the principal company and may appoint the same person to be the liquidator for the two companies and may make provision for such other matters as may be necessary in view of the companies

¹ The Insurance Act, 1938, S 54

being wound up as if they were one company. An application may also be made in relation to the winding up of the secondary company in conjunction with the principal company by any creditor of, or person interested in, the principal or the secondary company. Unless otherwise ordered the winding up of the secondary company will commence at the same time as that of the principal company. Before ordering the winding up of the secondary company the Court must hear all objections relating thereto where the winding up of the secondary company does not commence at the same time as that of the principal company.¹

In adjusting the rights and liabilities of the members of principal and secondary companies among themselves the Court must have regard to the constitution of the companies, in pursuance of which the transfer had taken place, in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company or as near thereto as possible. Where a company stands in the relation of a principal company to one insurance company and in the relation of a secondary company to some other insurance company or where there are several insurance companies standing in the relation of secondary companies to one principal company, the Court may deal with any number of such companies together or in separate groups as it thinks most expedient upon the principles stated above.²

Valuation of Liabilities :

In the winding of an insurance company or in the insolvency of any other insurer, the value of the assets and the liabilities of the insurer must be ascertained in such manner as the liquidator or receiver in insolvency thinks fit subject to any directions which the Court may give and in the case of current contracts in respect of life insurance business, according to the method and basis, to be determined by an actuary approved by the Court³.

Application of Surplus Assets of Life Insurance Fund :

In the winding up of an insurance company and in the

¹ Insurance Act, 1938, S. 57 (1), (2), (4) & (5).

² Ibid, S. 57 (3) & (6).

³ Insurance Act, 1938, S. 55 (1).

insolvency of any other insurer the value of the assets and liabilities of the insurer in respect of life insurance business must be ascertained separately from the value of any other assets or any other liabilities of the insurer and no such assets can be applied to the discharge of any liabilities other than those in respect of life insurance business except when there is a surplus of assets over liabilities in respect of life insurance business. In ascertaining the amount of surplus, in case there is such a surplus, addition to liabilities is to be made where any portion of the profits on the whole business had been allocated by the insurer to policy-holders in respect of life insurance business. The addition is to be of an amount which is of the same proportion of the surplus without such addition as the profits allocated bear to the profits allocated to the policy-holders during the ten years immediately preceding the winding up or insolvency. The following example will make it clear:—In winding up the assets of company "A" in respect of life insurance business exceed liabilities by Rs. 10,000/-, Rs. 20,000/- being assets and Rs. 10,000/- being liabilities. But before the winding up, company "A" allocated Rs. 1000/-, being portion of the profits to life policy-holders. During ten years preceding the winding up Rs. 10,000/- was allocated to life-policy-holders out of the profits. Therefore the surplus of assets in respect of life insurance business will not be Rs. 10,000/- but (Rs. 20,000/—(Rs. 10,000+1000) =Rs. 9000/-. The sum of Rs. 1000/- which is added to liabilities is $\frac{1}{10}$ of Rs. 10,000 - (being the surplus without such addition) which is of the same proportion as the sum allocated for profits *i.e.*, Rs. 1000 - bears to the total sums of profits allocated during the preceding ten years *i.e.*, Rs. 10,000/-. But the Court may vary the proportion of the sum to be added if it thinks that the above formula is inequitable in the circumstances or that there has been no allocation of profits¹

Reduction of Contracts of Insurance :

In the case of liquidation of an insurance company or the insolvency of an insurer the Court may reduce the amount of insurance contracts of all classes of the company or the insurer upon such terms and subject to such conditions as the Court thinks

¹ Insurance Act, 1936, S. 56 (1) & (2).

just. But where, prior to winding up, a company carrying on the business of life insurance has been proved to be insolvent, the Court may, if it thinks fit, reduce the amount of insurance contracts upon such terms and subject to such conditions as the Court thinks fit instead of making a winding up order. Orders as above can be made only on an application to be made either by the liquidator or by or on behalf of the company, or by a policy-holder or by the Superintendent of Insurance.¹ For the purpose of any such reduction of contracts the value of the assets and liabilities of the company and all claims in respect of policies issued by it must be ascertained according to the directions of the Court if any and subject to the rule that the liabilities on all current contracts effected in the course of life insurance business including annuity business is to be calculated by the method and upon the basis to be determined by an actuary approved by the Court.²

Partial winding up :

If at any time it appears expedient that the affairs of an insurance company (not any other insurer) in respect of any class of business comprised in the undertaking of the company should be wound up but that any other class of business comprised in the undertaking should continue to be carried on by the company or be transferred to another insurer, a scheme for such purpose may be prepared and submitted to the Court and, on its being sanctioned by the court, it will become effective. But any such scheme must provide for the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets which may arise in relation to the part of the business wound up) and also for the future rights of the different classes of policy-holders and the manner for winding up the part of the business proposed to be wound up. In calculating the assets and liabilities and the allocation thereof for this purpose the same rules as to valuation as referred to above should be adhered to.³

¹ Ibid, S. 61 (1), (2) & (3).

² Ibid, S. 55 (2) & 6th Schedule.

³ Insurance Act, 1938, S. 58.

Provident Societies :**Definition :—**

Provident society means a person, or partnership or a company which receives premiums or contributions for securing annuities on human life not exceeding Rs 50/- or for a fixed sum, not exceeding Rs. 500/- exclusive of any profits or bonus, to be paid on the happening of any of the following contingencies¹ —

- (a) the birth, marriage, or death of any person or the survival by a person of a stated age or contingency ;
- (b) failure of issue ,
- (c) the occurrence of a social, religious or other ceremonial occasion
- (d) disablement in consequence of sickness or accident ,
- (e) the necessity of providing for the education of a dependent , and
- (f) any other contingency which may be prescribed or authorised by the Provincial Government with the approval of the Central Government

Name :

A provident society if started after the commencement of the Act must adopt and, if started before such commencement, must continue to use after six months of such commencement as its name words which include the word ' provident ' and exclude the word ' life "

Insurable Interest :

No provident society can issue a policy whereby the money secured by it is payable to any person other than the person paying the premium thereon or the wife, husband, child, grand child, parent, brother or sister, nephew or niece of such person. In other words a person is deemed to have an insurable interest in the lives of these relations only for the purpose of provident insurance²

Dividing Business :

No provident society like an insurer can carry on business on

¹ Ibid, Ss 65 & 66

² Insurance Act, 1938, S 67

³ Insurance Act, 1938, S. 58.

the dividing principle¹. But where a society had been doing business on the dividing principle at the commencement of the Act, the Superintendent may allow the society to continue the old business on dividing principle for a period not exceeding two years with a view to reorganising its business on new lines prescribed by the Act provided the society applies within three months from the commencement of the Act for permission to do so and does not enter into any new business on the dividing principle after the commencement of the Act. If a society carries on business on the dividing principle excepting as aforesaid the Superintendent of Insurance is under a duty to take steps, as soon as possible, to have the society wound up.²

Registration :

No provident society except one registered under the Provident Insurance Societies Act, 1912, can receive any premium or contribution until it has obtained from the Superintendent of Insurance a certificate of registration.³ Every application for registration must be accompanied by the following :⁴

- (a) A certified copy of the Memorandum and Articles of Association in case the society is a company or a certified copy of the deed of constitution of the society in case it is not a company and in every case a certified copy of the rules of the society ;
- (b) the names and addresses of the proprietors or directors, and the managers of the society ;
- (c) certificate from the Reserve Bank of India that the deposit required under the Act as mentioned below has been made ; and
- (d) a declaration verified by an affidavit that the minimum working capital required under the Act is available.

If the superintendent is satisfied that all the requirements of the Act have been complied with, he will register the society and its rules and issue a certificate of registration and he may refuse to issue such a certificate until he is so satisfied.⁵

¹ See *ante* for the meaning of dividing principle.

² *Ibid.*, S. 69.

³ *Ibid.*, S. 70 (1).

⁴ *Ibid.*, S. 90 (2).

⁵ Insurance Act, 1938, S. 70 (3).

Cancellation of Registration :

The Superintendent of Insurance may cancel the registration of a society if he obtains the sanction of the Court to do so after giving previous notice in writing to the society specifying the grounds for the proposed cancellation and allowing the society an opportunity of being heard. The grounds on which the Superintendent may apply for and effect cancellation of registration of a society are the following¹ :—

- (a) If he is satisfied as the result of an enquiry made by him under s. 87 of the Act—
 - (i) that the society is insolvent or is likely to become so, or
 - (ii) that the business of the society is conducted fraudulently or not in accordance with the rules thereof, or that it is in the interests of the policy-holders that the society should cease to carry on business.
- (b) If the deposits required under the Act have not been made ; or
- (c) If the society, having failed to comply with any requirements of the Act, has continued such failure for a period of one month after notice of such failure has been conveyed to the society by the Superintendent of Insurance.

But where the society is insolvent or likely to become so as under clause (a) (i) above, the Superintendent may, instead of applying for cancellation of registration, make a recommendation to the court that the contracts of the society should be reduced in such manner and subject to such conditions as he may indicate

Working Capital :

Every provident society established after the commencement of the Act, must have a paid up capital sufficient to provide as working capital a net sum of not less than Rs. 5000/- exclusive of deposits made under the Act and in the case of a company exclusive of any expenses incurred in connection with the formation of the company. Otherwise the society will not be registered.²

¹ Ibid. S. 70 (4)

² Insurance Act, 1938, S. 72

Deposits :

Every provident society must, if established before the commencement of the Act within one year from such commencement, or, if established after the commencement of the Act before the society applies for registration, deposit and keep deposited with one of the offices of the Reserve Bank of India, for and on behalf of the Central Government, cash or approved securities amounting at the market value of the securities on the date of the deposit to Rs. 5000/- and must thereafter make each year a further deposit amounting to not less than one fifth of the gross premium income for the year until the total amount so deposited and kept come upto Rs. 50,000/-¹

Rules :—

Every provident society established after the commencement of the Act must set forth in its rules the following² :—

- (a) the name, the object and the location of the registered office of the society;
- (b) the contingencies or the classes of contingency on the happening of which money is to be paid;
- (c) the conditions to be complied with before, and the payments to be made on, admission to the society ;
- (d) the rates of premium or contribution, and the periods for which or the times at which premiums or contributions are payable ;
- (e) the maximum amount payable to a subscriber or policy-holder ;
- (f) the nature and amounts of the benefits provided for by the society ;
- (g) the circumstances in which any bonus may be paid to a policy-holder ;
- (h) the nature of the evidence required for the proof of the happening of any contingency on which money is to be paid ;
- (i) the circumstances in which policies may be forfeited or renewed or the whole or a part of the premiums paid on

¹ Ibid, S. 73.

² Ibid, S. 74 (1).

- a policy may be renewed, or a surrender value of a policy may be granted ;
- (j) the penalties for delay in paying or failure to pay premiums or contributions ;
- (k) the proportion of the annual income of the society which may be disbursed on and the provisions to be made for meeting the expenses of the management of the society ;
- (l) the person or persons who or the authority which shall have power to invest the funds of the society ;
- (m) the provisions for appointment of auditors and their remuneration ;
- (n) the procedure to be adopted in altering the rules of the society ;
- (o) the following unless these are provided for in the articles of association of a society which is a company incorporated under the Indian Companies Act, 1913,—
 - (i) the mode of appointment and removal; the qualification and the powers of a director, manager, secretary or other officer of the society ;
 - (ii) the manner of raising additional capital.
 - (iii) the provisions for the holding of general meetings of the members and policy-holders and for the powers to be exercised and the procedure to be followed thereat ; and
- (p) Such other matters as may be prescribed.

Where the rules of any provident society registered under the Provident Insurance Societies Act, 1912, do not contain the particulars mentioned above, the society must, before the expiry of one year from the commencement of the Act, amend the rules so as to comply with the above requirements.

Amendment of Rules :

No amendment of any rule of a provident society is valid until it has been sent to and duly registered by the Superintendent of Insurance. The Superintendent will register the amendment if he is satisfied that the proposed amendment is neither contrary to the provisions of the Act nor does it unfairly affect the rights of existing members or policy-holders of the society.¹

¹ Insurance Act, 1938, S. 75.

Register of Books :

Every provident society must keep at its registered office¹—

- (a) a register of members in which will be entered the name, address and occupation, if any, of every proprietor, director, manager or secretary and of every member of the society ;
- (b) a register or record of policies in which must be entered, in respect of every policy issued by the society, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the society has notice ;
- (c) a register of claims in which must be entered every claim made, together with the date of the claim, the name and address of the claimant and the date on which the claim is discharged or in the case of a claim which is rejected the date of rejection and the grounds therefor ;
- (d) a register of agents in which shall be entered the name and address of every agent employed by the society ;
- (e) a cash book in which must be entered separately for each class of contingency mentioned above all sums received and expended by the society and the matters in respect of which the receipt or expenditure takes place ;
- (f) a ledger ; and
- (g) a journal.

Revenue Account and Balance-sheet :

Every provident society must at the expiry of each calendar year prepare a revenue account and balance sheet in the prescribed manner, together with a report on the general state of the society's affairs and have the revenue account and the balance sheet audited by an auditor who shall have all the powers given to an auditor under s. 145 of the Indian Companies Act.²

Annual Statements :

Every provident society must at the expiry of each calendar year prepare with respect to that year :³

¹ Ibid, S. 79.

² Insurance Act, 1939, S. 80 (1).

³ Ibid, S. 80 (2).

- (a) a statement showing separately for each class of total amount insured thereby and the total premium income received in respect thereof and the number of existing policies discontinued during the year with the total amount insured thereby, and
 - (i) the total amount of claims made and the total amount paid in satisfaction thereof ;
- (b) a statement showing details of every insurance effected on a life other than the life of the person insuring e.g., details regarding B when A effects a policy on the life of B.
- (c) a statement showing the total amount paid as allowances to agents and canvassers.

Actuarial Report and Abstract :

Every provident society must once in every five years or at such shorter intervals as may be laid down by the rules of the society cause an investigation to be made into its financial condition including the valuation of its liabilities and assets by an actuary.¹ The report of the actuary must contain an abstract which is to specify²—

- (a) the general principles adopted in the valuation, including the method by which the valuation age of lives was ascertained ;
- (b) the rate at each age of the mortality and any other factor assumed and the annuity values used in valuation;
- (c) the reserve values held against policies effected ;
- (d) the rate of interest assumed, and
- (e) the provision made for expenses.

A certificate by a principal officer of the society, that all materials necessary for proper valuation have been placed at the disposal of the actuary and that full and accurate particulars of every policy under which there is a liability, actual or contingent, have been furnished to the actuary for the purpose of investigation, must be appended to the report of the actuary.

If the actuary finds that the financial condition of the society is such that no surplus exists for distribution as bonus to the policy-

¹ Insurance Act, 1938, S. 81 (1).

² Ibid, S. 81 (2).

holders or as dividend to the share-holders he is to state in his report whether in his opinion the society is insolvent and, if so, whether it shall be wound up or not, and the extent to which in his opinion existing contracts should be modified or existing rates of premium should be adjusted to make good the deficiency in the assets.¹

Submission of Returns and Abstracts :

The revenue account and balance sheet with the auditor's report thereon, report of the general state of the society's affairs, annual statements, actuarial abstracts referred to above must be furnished by a society as returns to the Superintendent of Insurance within three months from the end of the period to which they relate.²

Supply of Documents :

Every provident society must on demand deliver free of cost to any member of the society and to any non-member at a charge not exceeding Re. 1/- a copy of the rules of the society.³ Every provident society must send to any member or policy-holder copies of the revenue account, the auditor's report, and report on the general state of the society's affairs within fourteen days from the receipt of the application made in this behalf and on payment of a fee not exceeding Re. 1/- provided the application is made within two years from the date on which the document or documents were furnished to the Superintendent.⁴

Actuarial Examination of Schemes :

In the case of a society established after the commencement of the Act, every scheme of insurance which it proposes to put into operation must be examined by an actuary and the society cannot receive any premium or contribution in connection with the scheme until the actuary has certified that the scheme is sound and such certificate has been forwarded to the Superintendent of Insurance.

In the case of a society registered before the commencement of the Act, the requirement is the same as regards new schemes

¹ Insurance Act, 1938, S. 81 (3).

² Ibid, S. 82 (1).

³ Ibid, S. 76.

⁴ Ibid, S. 82.

which it proposes to put into operation after the commencement of the Act. In regard to old schemes, the society must submit all schemes of insurance which the society has in operation at the commencement of the Act to examination by an actuary and send the report of the actuary thereon to the Superintendent of Insurance before the expiry of six months from the commencement of the Act. The report of the actuary must state in respect of each scheme whether it is actuarially sound, and where no actuarial report has been made within two years preceding the report, the report must also state whether the assets of the society are sufficient to meet its liabilities under the existing schemes, and if not, how in the opinion of the actuary the existing contracts should be modified. If any scheme is reported by the actuary to be actuarially unsound, the Superintendent of Insurance must give notice to the society prohibiting the operation of the scheme; and the society cannot receive any premium or effect any policy in connection with the scheme after the expiry of one month from the receipt of the notice. Where a scheme is thus discontinued, the society must set apart out of its assets the sum sufficient in the opinion of the actuary to meet the liabilities incurred under the scheme so discontinued when its assets are sufficient to meet all existing liabilities. But if its assets are not sufficient to meet all existing liabilities it must apply to the Court within three months from such discontinuance for a modification of its existing contracts or failing such modification for the winding up of the society.¹

Separation of Accounts and Funds :

Where a provident society effects policies of insurance in connection with more than one of the classes of contingency mentioned above, the receipts and payments in respect of each such class must be recorded in a separate account in the cash book which is to be kept accordingly.²

Investment and Loan :

Every provident society must invest all surplus assets in Government securities on securities mentioned in s. 20 of the

¹ Insurance Act, 1938, S. 84.

² Ibid, S. 85.

Indian Trusts Act until the total amount invested amounts to not less than fifty per cent of the total assets of the society and keep the same invested to the extent of such fifty per cent unless it already holds invested in such securities not less than fifty per cent of its total assets.¹ The funds or investments of a provident society except the deposit kept with the Reserve Bank must be kept in the name of the society.

No provident society can advance any loan to any of its directors or officers out of its assets except on the security of a policy of insurance held in the society and to the extent of the surrender value of such policy or to any concern of which a director or officer of the society is a director or partner.²

Any director or officer of a society, which advances a loan in contravention of the above provision, who is knowingly a party to the above contravention will be jointly and severally liable to the society for the amount of the loan and such amount together with interest not exceeding 12% per annum will be recoverable by execution on the application by the Superintendent of Insurance to any competent Court as if a decree for such amount had been passed by that Court. Such director or officer is also liable for other penalties provided by the Act.³

Inspection of Books :

The books of every provident society must at all reasonable times be open to inspection by the Superintendent of Insurance or any person appointed by him for the purpose or by any member or policy-holder of the society who has made an application for the purpose to the Superintendent of Insurance.⁴

Inquiry by the Superintendent of Insurance :

The Superintendent of Insurance must at least once in two years and may, at any other time, if he thinks fit, visit personally or depute a suitable person to visit the principal office of a provident society and inquire into the solvency of the society and the manner

¹ Ibid, S. 85 (3).

² Ibid, S. 85 (4).

³ Ibid, S. 85 (4).

⁴ Ibid, S. 86.

in which the business of the society is conducted, or may, after giving notice to the society and giving it an opportunity to be heard, direct such an enquiry to be made by an auditor or actuary appointed by him.¹ For the purpose of any such enquiry the superintendent or the auditor or actuary, as the case may, will be entitled to examine all books and documents of the society and may demand from the society or any officer of the society such explanations as he may require on any matter relating to the affairs of the society.² The results of any such enquiry are to be recorded in a report which is to be kept in the office of the Superintendent and a copy of the Report must be sent to the society concerned and be open to inspection by any member or policy-holder of the society.³

Managing Agents :

A provident society, like an ordinary insurance company, cannot employ a managing agent and the prohibition is the same as in the case of ordinary insurance companies.

Assignment and Nomination :

The assignment and nomination of a policy in a provident society is subject to the same law as in the case of assignment of a life insurance policy. We have already studied it. The only difference in the case of a policy in a provident society is that in regard to nomination, no nomination is valid unless the nominee is the husband, or wife, or father, or mother, or child, or grand-child, or brother, or sister, or nephew, or niece of the holder of the policy.⁴

Reduction of Insurance Contracts :

The Court may make an order reducing the amount of the insurance contracts of a provident society upon such terms and subject to such conditions as the Court thinks just on the following grounds⁵ :—

(a) If where the society is insolvent or is likely to become

¹ Ibid, S. 87 (1).

² Ibid, S. 87 (2).

³ Ibid, S. 87 (3).

⁴ Insurance Act, 1938, S. 97 (2).

⁵ Ibid, S. 89.

so, the Superintendent applies to the Court recommending that the contracts of the society should be reduced in such manner and on such conditions as he may indicate as an alternative to cancelling the registration of the society ;

- (b) If while a society is in liquidation the Court thinks fit.
- (c) If when a society has been proved to be insolvent the Court thinks fit to do so in place of making an order for the winding up of the society ; or
- (d) If the Court is satisfied on an application made in this behalf by the society supported by the report of an actuary, and after giving the policy-holders an opportunity to be heard that it is desirable to do so.

Winding up :

In addition to the grounds on which a company may be wound up by Court under the Indian Companies Act, 1913, the Court may order the winding up of a society if its registration is cancelled and in such a case the Superintendent may himself order the winding up of the society.¹ But a provident society cannot be wound up voluntarily whether it is a company or not except for the purpose of effecting an amalgamation or reconstruction of the society or on the ground that by reason of its liabilities it cannot continue its business.

Appointment of Liquidator :

When a provident society is wound up either by Court or voluntarily, the society must give notice of the order or resolution authorising the winding up to the Superintendent of Insurance within seven days from the date of such order or resolution. In a voluntary liquidation the Superintendent must appoint the liquidator and fix his remunerations. Such a liquidator may be removed by the Superintendent if he fails to discharge his duties properly.²

Powers of Liquidator :

A liquidator appointed to wind up a society has the power³ :—

¹ Ibid, S. 88.

² Insurance Act, 1938, S. 90.

³ Ibid, S. 91.

- (a) to institute or defend any legal proceedings on behalf of the society by his name of office ;
- (b) to determine the contribution to be made by members of the society respectively to the assets of the society ; the liquidator has the same power for settling the list of contributories and realising the amount of contribution, as of the official liquidator under the Indian Companies Act, 1913.
- (c) to investigate all claims against the society and to decide questions of priority arising between claimants ;
- (d) to determine by what persons and in what proportion the costs of the liquidation are to be borne ;
- (e) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society.
- (f) to summon, and enforce the attendance of, witnesses and to compel the production of documents by the same means and as far as may be in the same manner as is provided in the case of civil courts ; and
- (g) with the sanction of the Superintendent of Insurance, to employ such establishment and to obtain such assistance from an actuary or an auditor as may be necessary for the discharge of his duties.

Procedure at Liquidation :

Collecting the property:--The liquidator must take charge of all property moveable or immoveable of the society and of all its books and documents.¹ If any proprietor or officer of the society fails to deliver to the liquidator any book or document when so required by the liquidator, he will be punishable with imprisonment which may extend to six months, or with fine which may extend to Rs. 500/- or both and the Court may order the delivery of the assets or book or document to the liquidator.²

Creditors' Meeting :

The liquidator must hold a meeting of creditors between twenty one and twentyeight days after his appointment and he

¹ Insurance Act, 1938, S. 92 (1).

² Ibid, S. 92 (2).

must send notice by post of such meeting within fifteen days of his appointment to every person who appears to him to be a creditor of the society specifying the date, hour and place of the meeting and also advertise notice of the meeting once in the local official Gazette and once at least in two newspapers circulating in the province in which the society is situated.¹

Committee of Inspection :—At the meeting of the creditors so convened the creditors are to determine whether they should apply for the appointment of any person as liquidator in the place of or jointly with the liquidator already appointed, or for the appointment of a committee of inspection. If they decide on any one of the above courses open to them they must apply by a creditor chosen for the purpose to the Superintendent of Insurance within fourteen days after the date of the meeting conveying their decision and the Superintendent is to appoint thereupon a suitable person in place of or jointly with the liquidator already appointed or, if so desired, a committee of inspection.² If a committee of inspection is appointed, it will, subject to any prescribed conditions, have a general power of supervision over the acts of the liquidator and will have the right to inspect his account at all reasonable times.³

Ascertainment of Liabilities and Assets :

The liquidator is to ascertain as soon as possible, with such assistance from an actuary as may be required, the amount of the society's liability to every person appearing by the society's books to be entitled to or interested in any policy issued by the society and is to give notice of the amount so found to each such person in the prescribed manner and each such person on receiving such notice will be bound by the value so ascertained.⁴

The liquidator must also make a valuation of the assets of the society and an estimate of the costs of the winding up and settle the list of contributories on the basis of these.⁵

Collection of Deposit and Distribution of Asset :

The liquidator must also apply to the Superintendent of

¹ Ibid, S. 91 (3).

² Insurance Act, 1938 S. 92.

³ Ibid, S. 92.

⁴ Ibid, S. 92 (6).

⁵ Ibid, S. 92 (7).

Insurance for the return of the deposit who must order the return of the same on such application subject to such terms and conditions as he may think fit.¹ In administering and distributing the assets of the society the liquidator must have regard to any directions that may be given by the creditors or contributories at a general meeting or by the Superintendent of Insurance.²

The liquidator must keep books of account in which he must record the proceedings at all meetings attended by him, all amounts received or expended by him and any other matter that may be prescribed, and these books may, with the sanction of the Superintendent, be inspected by any creditor or contributory.³

If the winding up continues for more than a year, the liquidator must summon a meeting of the creditors and contributories at the end of the first year and of each succeeding year, and must lay before them an account of his acts and dealings and of the conduct of the winding up and such account together with any views expressed thereon by the meeting must be forwarded by the liquidator to the Superintendent of Insurance.⁴

Subject to the provisions of the Act the liquidator should as far as practicable follow the procedure prescribed for the official liquidator under the Indian Companies Act, 1913.⁵

Dissolution of Provident Society :

As soon as the affairs of a provident society are fully wound up the liquidator must prepare an account of the winding up showing how the winding up has been conducted and the property of the society has been disposed of and must call a meeting of members, creditors, and contributories for the purpose of laying before it the account and giving any explanation thereof.⁶ Notice of the meeting has to be sent to each person individually and advertised in the local official Gazette and in at least two newspapers circulating in the province in which the society is situated.⁷

Within one week after the meeting the liquidator must send

¹ *Ibid*, S. 92 (8).

² Insurance Act, 1938 S. 92 (d).

³ *Ibid*, S. 92 (10).

⁴ *Ibid*, S. 92 (11).

⁵ *Ibid*, S. 92 (12).

⁶ *Ibid*, S. 93 (1).

⁷ *Ibid*, S. 93 (2).

to the Superintendent of Insurance a copy of the account and report to him the holding of the meeting and its date and forward to him a copy of the proceedings of the meeting.¹ The Superintendent may return the account to the liquidator if it is incomplete or unsatisfactory and may require the liquidator to carry out any further steps necessary to complete the winding up and the liquidator must comply with such requirement and submit a further report to the Superintendent within six months.² But if the Superintendent is satisfied that the affairs of the society have been fully wound up he must register the account of the liquidator who has to forthwith make over to the Superintendent such sums, if any, as might remain undisposed of. On the expiry of three months from the registering of the account the Superintendent must declare the society dissolved and notify the dissolution in the local official Gazette and the liquidator will thereupon be discharged from further responsibility.³ The sums, if any, made over by the liquidator, to the Superintendent prior to his discharge become the property of the Government if no order is obtained by any claimant from a competent court in respect of the disposal of such sums within a period of five years from the date on which such sums were made over to the Superintendent.⁴

Mutual Insurance Companies and Co-operative Life Insurance Society :

Definition :

A mutual insurance company means an insurer, being a company incorporated under the Indian Companies Act, 1913, which has no share capital and of which by its constitution only all policy-holders are members.⁵

A co-operative life insurance society means an insurer being a society registered under the co-operative societies Act, 1912, or under an act of a Provincial Legislature governing the registration of co-operative societies, which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members

¹ Insurance Act, 1938, S. 93 (3).

² Ibid, S. 93 (4).

³ Ibid, S. 93 (5).

⁴ Ibid, S. 93 (6).

⁵ Insurance Act, 1938, S. 95 (1).

on whose application the society is registered and all policy-holders are members.¹

Other co-operative societies (*i.e.*, societies not carrying on life insurance business) may be admitted as members of a co-operative life insurance society, without being eligible to any dividend, profit or bonus.²

A provincial Government may, subject to any rules made by the Central Government, empower the Registrar of co-operative societies of the province to register co-operative societies for the insurance of cattle or crops or both under the provisions of the co-operative societies Act in force in the province. A provincial Government may also make rules not inconsistent with any rules made by the Central Government to govern such societies and if any provision in the Act is inconsistent with those rules, such provision will not to that extent apply to such societies.

Working Capital :

The earlier provisions of the Act in respect of working capital do not apply to a mutual insurance company or to a co-operative insurance society.³ The requirement as to working capital for these are as follows. No mutual insurance company incorporated after 26th January, 1937 and no co-operative insurance society registered after that date can be registered under the Act, unless it has as working capital a sum of Rs. 15,000/- exclusive of deposit to be made before or at the time of applications for registration and of preliminary expenses, if any, incurred in the formation of the company or society.⁴

Deposit :

Every Mutual Insurance Company and every co-operative life Insurance society must, in respect of the life insurance business carried on by it in British India, deposit and keep deposited with one of the offices in India of the Reserve Bank of India, for and on behalf of the Central Government, a sum of Rs. 2,00,000/- in cash or in approved securities estimated at the market value of the

¹ Ibid, S. 95 (1).

² Ibid, S. 95 (2).

³ Ibid, S. 95 (3).

⁴ Ibid, S. 96.

⁵ Insurance Act, 1938 S. 97.

securities on the day of deposit.¹ The deposit may be made in instalments of which the first instalment must be of Rs. 25,000/- to be made before or at the time of the application for registration and the subsequent instalments must be annual instalments made before the expiry of each subsequent year of an amount in cash or in approved securities estimated at the market value of the securities on the day of the payment of the instalment, equal to one-third of the gross premium income received in the previous year.²

Assignment and Transfer :

The law relating to assignment is the same with regard to policies issued by these companies or societies as in the case of other policies excepting that an assignee or a transferee will not become a member of a mutual insurance company or a co-operative insurance society merely by reason of any such transfer or assignment.³

Publication of Notices and Documents :

Notwithstanding anything contained in the Indian Companies Act, 1913, a mutual Insurance company and a co-operative Life Insurance Society may, instead of sending the notices and the copies of the balance sheet, revenue account, and other documents which they are required to send to the members under the Indian Companies Act, 1913, secs. 79 and 131, publish such notices or documents once in a newspaper published in the English language and in a newspaper published in one Indian language circulating in the place where the principal office of the company is situated and, in case any members of the company are domiciled in any other province, in a newspaper or newspapers published in the principal languages of that province and circulating therein. But this does not relieve a mutual insurance company from filing the balance sheet and profit and loss account with the Registrar of joint stock Companies of the province under s. 134 of the Indian Companies Act, 1913 or a co-operative life insurance society from filing such documents with the Registrar of co-operative societies of the province as he is required under the co-operative societies Act, 1912 or any other Provincial legislation.⁴

¹ Ibid, S. 98 (1).

² Insurance Act, 1938, S. 98 (2).

³ Ibid, S. 99.

⁴ Insurance Act, 1938, S. 100.

Supply of Documents to Members :

Every Mutual Insurance Company and every Co-operative Life Insurance Society must furnish a copy of the document or documents filed with the Registrar of Joint Stock Companies or the Registrar of co-operative societies as the case may be to a member free of cost within fourteen days of the application made by the member in this behalf, provided the application is made by the member within two years from the date on which such document or documents are filed.¹

Penalties :

Penalty for non-compliance with the provisions of the Act :—

Any insurer who makes default in complying with or acts in contravention of any requirement of the Act and, where the insurer is a company, and director, managing agent, manager, or other officer of the company, or where the insurer is a firm, any partner of the firm who is knowingly a party to the default, is punishable with fine which may extend to Rs 1000 - and in the case of a continuing default, with an additional fine which may extend to Rs. 500/- for every day during which the default continues.²

Any provident society which makes any default in complying with any requirement of the Act applicable to it and any director managing agent, manager, secretary, or other officer of the society who is knowingly a party to the default is punishable with fine which may extend to Rs 500 - or in the case of a continuing default with fine which may extend to Rs 250 for every day during which the default continues.³

Penalty for Non-compliance with the Requirements Regarding Capital and Deposit :

But where the default is in respect of the requirements as to working capital and deposit, an insurer or any one acting on behalf of an insurer who transacts any class of insurance business in contravention of these requirements is punishable with fine

¹ Ibid, S 101

² Insurance Act, 1938, S. 102 (1).

³ Ibid, S. 102 (2).

which may extend to Rs. 200/-, and any one taking out a policy from an insurer or person who, to his knowledge, has contravened or continues to contravene these requirements is punishable with fine which may extend to Rs. 500/-¹.

*Penalty for false statement in a document :—*Any person wilfully and knowingly making a false statement in respect of any material particular in any return, report, certificate, balance-sheet or other document required to be furnished under the Act, is punishable with imprisonment for a term which may extend to three years or with fine which may extend to Rs. 1000/- or with both.²

Penalty for Wrongful Withdrawal or Withholding of Property :

Any director, managing agent, manager or other officer of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it for purposes not authorised by the Act is, on the complaint of the insurer or any member or policy-holder, punishable with fine not exceeding Rs. 1000/- and may be ordered by the Court to deliver up within a time the property so wrongfully obtained or withheld or misapplied and in default to suffer imprisonment for a term not exceeding two years.³ In the case of liquidation of a provident society every officer, manager, proprietor or director of the society who withholds any property or books or assets from the liquidator when so required by the liquidator, will be punishable with imprisonment which may extend to six months, or with fine which may extend to Rs. 500/- or both and the court may order the delivery of the assets, or book or property to the liquidator.⁴

Penalty for Wrongfully Diminishing Life Insurance Fund :

Where an Insurance Company is in liquidation and the court is satisfied, on the application of the insurer or any member of the insurance company or any policy holder or the liquidator of the company, that by reason of any contravention of the provisions

¹ Ibid, S. 103 (1), (2).

² Insurance Act, 1938 S. 104.

³ Ibid, S. 103.

⁴ Ibid, S. 91 (2).

of the Act the amount of the life insurance fund has been diminished, every person who was at the time of the contravention a director, manager, liquidator or an officer of the company will be deemed guilty of misfeasance unless he proves that the contravention occurred without his consent or connivance and was not facilitated by any neglect or omission on his part. Any person guilty of such misfeasance may be proceeded against by the Court under secs. 235 and 237 of the Indian Companies Act and the Court has also the power to assess the sum by which the amount of the life insurance fund has been diminished by reason of the misfeasance and to order any person guilty thereof to contribute to that fund the whole or any part of that sum by way of compensation.¹

Sanction of the Advocate-General :—No proceeding against an insurer, or any director, manager or other officer of an insurer under this Act can be instituted by any person except the Superintendent of Insurance without the sanction of the Advocate General of the province in which the principal place of business of the insurer is situate.

Relief by Court :—Where any person is liable in respect of negligence, default, breach of duty or breach of trust in relation to an insurer, the Court may relieve him of his liability on such terms as it thinks fit if it appears to the Court that he has acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused of his liability.²

Cognizance of offences :—Only a Presidency Magistrate or a Magistrate of the first class can try any offence under the Act.³

¹ Insurance Act, 1938, S. 105.

² Ibid, S. 108.

³ Ibid, S. 109.

CHAPTER IX.

MORTGAGE.

A mortgage is a transfer of an interest in specific *immovable* property for the purpose of securing payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Thus, a mortgage may be (1) to secure a debt, or (2) to secure the performance of an engagement. (S. 58 of the Transfer of Property Act).

Classes of Mortgage :

Mortgages are of six kinds :—

(1) Simple mortgage, (2) Mortgage by conditional sale, (3) Usufructuary mortgage, (4) English Mortgage, (5) Mortgage by deposit of title deeds, and (6) Anomalous mortgage.

(1) Simple mortgage :

In a simple mortgage the mortgagor binds himself *personally* to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied in payment of the mortgage-money. In this kind of mortgage the mortgagor, however, remains in possession of the mortgaged property.

(2) Mortgage by conditional sale :

In this type of mortgage the mortgagor ostensibly sells the mortgaged property to the mortgagee on condition—

- (i) that on default of payment of the mortgage-money on a certain date the sale shall become *absolute*, or
- (ii) that on such payment being made the sale shall become void, or
- (iii) that on such payment being made the mortgagee shall re-transfer the mortgaged property to the mortgagor.

(3) Usufructuary mortgage :

In this kind of mortgage the mortgagor delivers or agrees to deliver the possession of the mortgaged property to the mortgagee,

and authorises him to collect the rents and profits accruing therefrom, and appropriate such rents and profits towards the payment of the principal money and interest owing on the mortgage debt.

(4) English mortgage :

Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but on condition that the mortgagee will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

An English mortgage is very similar to a mortgage by conditional sale. But there are fundamental differences between the two which may be stated as follows :—

- (a) In English mortgage the mortgagor binds himself to repay the loan on a certain day. But such an undertaking is not necessary in a mortgage by conditional sale.
- (b) In English mortgage there is an absolute sale of the property at the outset and the ownership of the mortgagee is complete, only to be divested in case the mortgagor pays on the appointed date. But in a mortgage by conditional sale, the sale is complete only on default of the mortgagor to pay on the appointed date, and the ownership of the mortgagee is qualified, which may become absolute if the mortgagor defaults.

(5) Equitable mortgage or mortgage by deposit of title deeds :

Where a borrower borrows money by depositing title deeds of immovable property by way of security, the transaction is called an equitable mortgage or mortgage by deposit of title deeds. In an equitable mortgage the following conditions must be satisfied :—

- (a) there must be delivery of title deeds to the creditor ;
- (b) there must be an intention to make the title deeds security for the loan ;
- (c) the mortgage must be created in the towns of Calcutta, Bombay, Madras, Karachi, Rangoon and a few other towns.

(6) Anomalous mortgage :

Any mortgage which does not belong to any of the above classes is called an anomalous mortgage. The customary mortgages of India belong to this class.

Rights of the mortgagor :

A mortgagor has the following rights in respect of the mortgaged property :

1. He can, at any time after the mortgage debt has become due, get back the mortgaged property, provided he has paid or offered to pay the mortgagee the full amount of the mortgage debt. On such payment or offer of payment the mortgagee, if he is in possession must deliver the possession of the property to the mortgagor, and, if he has any documents of the mortgagor, he must return the same. This right of the mortgagor to get back his property is known as the equity of redemption. This right can never be destroyed even if the mortgagor contracts to give away this right.

2. Where the mortgagor has deposited his title deeds to the mortgagee he can inspect and make copies of the deeds at his own expense.

3. Where the mortgagee effects improvements on the mortgaged property while the property is in his possession the mortgagor is always entitled to the improvements. But the mortgagee can charge the cost of such improvement on the mortgagor, provided the improvement was necessary for preserving the property and preventing waste.

4. Where the mortgagee in possession of the mortgaged property renews the lease of the property, the mortgagor, on redemption of the property, becomes entitled to the renewed lease.

5. Where the mortgagee in possession of the mortgaged property makes additions to the property, the mortgagor, on redemption, becomes entitled to such accretion.

Rights of the Mortgagee :

The mortgagee has the following rights :—

(1) He can obtain a decree for foreclosure against the mortgagor by which the mortgagor is deprived of his right of redemption and the mortgagee becomes the absolute owner of the

property. Foreclosure is granted only in case of mortgage by conditional sale where the mortgagor fails or neglects to pay the debt long after it becomes due.

(2) He can sell the property if the principal money with interest is not paid by the mortgagor after it has become due and he can realise his dues from the proceeds of the sale. In case of usufructuary mortgage and mortgage by conditional sale this right of sale cannot be exercised.

(3) He can sue for the mortgage money where—

- (a) the mortgagor has bound himself personally to pay the money, as in a simple mortgage ;
- (b) the mortgaged property has become insufficient to pay for the debt without the fault of either the mortgagor or the mortgagee ;
- (c) the security, whether property or title deeds, has been partially or totally lost due to the mortgagor's fault ;
- (d) the mortgagee is entitled to possession of the mortgaged property, as in mortgage by conditional sale or English mortgage, and the mortgagor is not giving him undisturbed possession.

Hypothecation :

The mortgage of movable property is called hypothecation. Neither the Contract Act nor the Transfer of Property Act deals with the problem of hypothecation, but it is well settled now that the mortgage of movable property, although unaccompanied by delivery of possession, is called hypothecation (*Deans v. Richardson*, 1871, 3 N. W. P. 54). It is also well settled that the hypothecatee can enforce his claim even against a *bonafide* transferee for value without notice of the hypothecatee's claim. Thus in *Shyam Sundar vs. Chetia* 1871, 3 W. R. 71, the hypothecatee was allowed to enforce his security against a purchaser from the mortgagor or the hypothecator who had purchased the hypothecated goods for a value and without notice of the hypothecatee's claim. It is submitted that this state of law in India is certainly very unsatisfactory. In the case of the mortgage of immovable property which can be created by registration only, any person dealing with the mortgaged property has automatically notice of the mortgage from the fact of registration, but in the case of mortgage of movable property, a third party can hardly know

himself of the mortgage since registration is not necessary. It is submitted that the law regarding hypothecation should be thoroughly overhauled in order to protect bonafide purchasers from fraudulent persons who deal with their property after having mortgaged the same without informing the purchaser of the same.

Lien :

Lien in its primary sense has been defined in Halsbury's Laws of England, as a right in one man to retain that which is in his possession belonging to another, until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract, for contract restricts a person's right to the stipulations in the contract. Such a lien is incidental to possession, but in exceptional cases such as in the case of liens for seamen's wages and Bottomry a lien may arise even without possession and may be enforced even against *bonafide* purchasers of the ship.

Lien is of two kinds, *viz.*, possessory and equitable.

Possessory lien :

Possessory lien is again of two kinds, *viz.* (a) General lien and (b) Particular lien. A general lien entitles a person in possession of goods to retain them until all claims or accounts of the persons in possession against the owner of the goods are satisfied. Such general lien has been established in the case of solicitors, bankers, factors, stock-brokers, warehouse-keepers and insurance brokers.

A particular lien, on the other hand, is a right to retain goods, until all charges incurred in respect of those goods only, have been paid. If the owner of the goods pays such charges, the goods cannot be retained until payment of the general balance due to the person having the particular lien. Thus a common carrier is under a legal obligation to carry goods and by way of compensation for such obligation, is entitled to retain the goods until the charge for carriage is paid. It has also been seen before that unpaid sellers have liens under particular circumstances.

Equitable lien :

An equitable lien is an equitable right, conferred by law upon one person to a charge upon the real or personal property of another

until certain specific claims have been satisfied. Thus a vendor of land has an equitable lien on the land sold for the whole or part of the purchase money until actual payment.

Termination of lien :

A lien is terminated under the following circumstances :

- (a) Payment by the debtor of the amount due to the holder of the lien.
- (b) The abandonment of the claim for a number of years, or claiming to retain the goods on grounds different from those on which the creditor rests his claim for lien making no mention of the lien, or claiming the lien for a particular debt where the lien is for a general balance.
- (c) Acceptance of security by the creditor for the debt showing an intention to waive the lien.
- (d) Delivery of the goods to the owner or his agent. Once delivery is given to the owner, the lien cannot be revived, but if the owner takes possession by fraud the lien revives if possession is recovered.

Pledge :

This subject has already been dealt with under the Law of Contract.

Distinction between the different types of security mentioned above :

A mortgage differs from a hypothecation in that mortgage refers to immovable property whereas hypothecation refers to movable property. A mortgagee's right to sue is governed by the Transfer of Property Act and Order 34 of the Civil Procedure Code. But a hypothecatee's right to sue is not governed by any specific statute. His remedy is by way of a suit for sale of the property hypothecated and for declaration of charge in his favour. It has also been observed that hypothecation can be created without registration, whereas a mortgage cannot be created without registration.

A pledge comes nearest to hypothecation. But even then there are differences between the two. In pledge there must be

an actual or constructive delivery of possession of the goods pledged to the pledgee or pawnee, but in hypothecation the goods need not be delivered to the hypothecatee. A hypothecatee cannot sell the hypothecated goods without a decree of the court. But a pledgee can himself sell the goods pledged without a decree of the court, after giving a reasonable notice to the pawnor.

All the aforementioned securities differ from a lien in that the former are the creation of agreement between the parties whereas a lien is the creation of law under certain circumstances irrespective of the agreement of the parties. A lien is also only a defensive right and cannot be enforced by a suit or by sale of the properties over which the lien is claimed. The only right that the holder of a lien enjoys is to retain the goods until his dues are satisfied.

CHAPTER X

LAW RELATING TO CARRIAGE OF GOODS

Introduction :

Goods are carried by land, sea and air. There are rules of law which regulate such carriage of goods. They fix the liability duty and rights of the consignor and the carrier. The inland transportation of goods is done by common carriers, private carriers, gratuitous carriers and the Railways. Prior to the passing of the Indian carriers Act (III of 1865) and the Indian Railways Act (IX of 1890) the law relating to carriers in India was governed by the English common law relating to carriers¹. The Indian Carriers Act (III of 1865) was passed with a view to limit the liability of common carriers imposed on them by the English common law and also to declare their liability for the negligence or criminal acts of themselves, their servants or agents². The Indian carriers Act is largely based on the English Carriers Act, 1830. It applies to common carriers transporting goods for hire from place to place by land or inland navigation. Thus private carriers and carriers by sea are not affected by the Act. Even in the case of common carriers by land or inland navigation the Act does not displace the English common law altogether except in so far it limits the liability of such carriers in certain cases and precludes them from contracting out of their common law liability in the case of negligence and criminal acts of themselves or their agents. Thus the English common law so far as it is not modified by the Carriers Act, 1865 still regulates the duties and liabilities of such carriers in India³. The carriers Act, 1865 is now amended by two further Acts namely Act X of 1899 and Act XIII of 1921. Private carriers and gratuitous carriers were liable as under the English common law and their position must be the same in India⁴, their duties and liabilities being governed by the Indian

¹ *Chagemal vs. The Port Commissioner of Calcutta*, 18 Cal. 427
Mathora Kant Shaw vs. India General Steam Navigation Co., 10 Cal 166
 (181) F.B.; *E. I. Ry. Co. vs. Jordan*, 4 B.L.R.O.C. 97.

² Preamble to the Indian Carriers Act, 1865.

³ *Mothona Kant Shaw vs. India General Steam Navigation Co.*, supra
 (see *Mitter J.*).

⁴ *Clegg vs. Bernard*, 1 Sm. L.C. 175.

contract Act¹. The duties and liabilities of railways were the same as those of common carriers under the English Law before the passing of the Railways Act (IX of 1890)². But the Railways Act, 1890, has now limited their liabilities to those of a bailee.³ The law relating to carriage of goods by sea in India continued to be governed by the English common law, unaffected by the carriers Act or the Railways Act, until the passing of the Carriage of Goods by Sea Act (XXVI of 1925) which now regulates the carriage of goods shipped from Indian ports under bills of lading. But even now carriage of goods by sea under a charter party or in respect of cases not covered by the Carriage of Goods by Sea Act, 1925, *i.e.*, the rights and duties of the master, or the law relating to bottomry and respondentia or the question of salvage, would be governed by the common law of England.⁴

Kinds of Carriers :

The term 'carrier' is of very wide denotation and covers any one who carries goods or passengers whether for reward or not and is wide enough to include a railway owned and controlled by Government which takes upon itself the duty of carrying goods from one place to another⁵. Carriers are broadly divided into (a) carriers of goods and (b) carriers of passengers. Carriers of goods are again subdivided into (i) common or public carriers, (ii) private carriers and (iii) gratuitous or voluntary carriers⁶.

Common Carriers :

A common carrier has been defined by the Indian Carriers Act, 1865⁷, as a person including any association or body of persons whether incorporated or not, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately. We may set out the essential features of a common carrier as follows:—

(a) It may be a person, or a partnership or a joint family

¹ See the Law of Contract, *supra*.; S. 151, 152 & 161 of the Indian Contract Act.

² E. I. Ry. Co. *vs.* Jordan, *supra*.

³ S. 72.

⁴ Irrawaddy Flotilla Co. *vs.* Bhagwandas, L.R. 18 I.A. 121.

⁵ Secretary of State *vs.* Gopal Rai Paliram, L.R. (1937) 2 Cal. 414 (620).

⁶ Hari Rao's Indian Railways Act, P. xii.

⁷ Section 2.

business or a company. If it is a partnership firm all the partners will be jointly and severally subject to the liabilities of a common carrier. If it is a joint family business, all the members, adult and minor, will incur the liabilities of common carrier.

- (b) It must transport goods or property and not persons.
- (c) It must transport goods as a business and not merely as casual occupations.
- (d) It must transport goods for hire and not gratuitously.
- (e) It must carry goods indiscriminately for all *i.e.*, for anyone who wants to employ it. It cannot choose to serve some people and refuse to serve others. A carrier who reserves the right of accepting or rejecting goods cannot be considered a common carrier¹.
- (f) It must transport by land and inland navigation. Thus a carrier by sea is not to be regarded as a common carrier².
- (g) It must not be the Government³.

It is clear, therefore, that many carriers who would be regarded as common carriers under the English law are not to be considered as such under the Indian carriers Act, e.g., carriers by sea or carriers of passengers.

Duties of a Common Carrier :

The duties of a common carrier may be set out as follows :—

- (1) A common carrier must carry the goods of all persons offering to pay a reasonable charge for carriage⁴. Unless, of course, the goods are not of the description which he professes or is accustomed to carry⁵ or are of such nature as would expose him to exceptional danger⁶, or there is no accommodation for the goods⁷, or the

¹ *Coggs vs. Barnard*, 1 Sm.L.C. 12th Ed. 191.

² *Mackillican vs. The Compagnie Des Messageries Maritimes De France*, 6 Cal. 227.

³ *Alamgir Footwear and Co. vs. Secretary of State*, (1933) All. 466.

⁴ *Wylde vs. Pickford*, (1841) 8 M. & W. 443.

⁵ *Great Western Railway vs. Sutton*, (1868) L.R. 4 H.L. 226; *Oxlad vs. N. E. Ry. Co.*, (1860) 15 C.B.N.S. 680.

⁶ *Edwards vs. Sherratt*, (1881) 1 East 604; *G. N. Ry. Co. vs. L. E. P. Transport Co.*, (1912) 2 K.B. 442.

⁷ *Johnson vs. Rogers*, (1863) 7 Show. 327.

goods are brought too late or too long a time before the journey is to begin.¹ If he refuses to carry the goods without justification (*i.e.*, except on the grounds mentioned above) he may be sued by the consignor of the goods. It was observed in *G. W. Ry. Co. v. Sutton*², by Blackburn J., "The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for doing so) on being paid a reasonable compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him."

- (2) A common carrier must deliver the goods at the time agreed upon, or, where no time is stipulated within a reasonable time having regard to the circumstances of the case³.
- (3) A common carrier is bound to carry goods by the ordinary route which he professes to be his route⁴. But this need not be the shortest route⁵. He is, however, entitled to deviate from the ordinary route if that be necessary for the safe carriage of the goods and in that case the delay and deviation would be excused⁶.
- (4) A common carrier must deliver the goods to the consignee and to provide a place for their delivery. He will be liable for any loss arising from his neglect to do so⁷. But in the absence of agreement he is not bound to deliver the goods at the house of the consignee

¹ *Pickford vs. Grand Junction Ry.*, (1844) 12 M & W. 166.

² (1869) L.R. 4 H.L. 226, 237.

³ *Taylor vs. Great Northern Railway*, (1855) L.R. 1 C.P. 385; *L. & N. W. Rail Co. vs. Neilson*, (1922) 2 A.C. 263; *Dunn vs. Bucknall Bros.*, (1902) 2 K.B. 614.

⁴ *Foster vs. G. W. Ry.*, (1904) 2 K.B. 306.

⁵ *Hales vs. London and North Western Railway*, (1863) 4 Ex. & S. 66

⁶ *Taylor vs. G. N. Ry. Co.*, (1866) L.R.I.C.P. at p. 308.

⁷ *Rooth vs. N. E. Ry. Co.*, L.R. 2 Ex. 195, 179.

exceptions and modifications, some of which are recognised by the common law and some of which are statutory *i.e.*, imposed by the Carriers Act of 1865. We may note these exceptions below.

Exceptions under the Common Law :

The common law recognises certain exceptions which have the effect of either relieving the liability of the common carrier altogether in certain cases or of reducing such liability from that of an insurer to that of an ordinary bailee. These exceptions are as follows :—

- (1) A common carrier is relieved of liability altogether in case of loss of or damage to the goods intrusted to its care if such loss or damage is caused by (a) an act of God *e.g.*, a tempest, or (b) an act of the king's enemies *e.g.*, seizure, or destruction of the goods by enemies, or (c) the inherent vice or defect in the goods themselves *e.g.*, bad packing or deterioration by evaporation or breakage¹. The position is correctly summarised by Lord Duredin in *London and North Western Ry Co. v. Richard Hudson and Sons Ltd.*,² in the following words—"That a common carrier is an insurer of goods entrusted to him for carriage and can only excuse himself on the ground of an act of God, or of inherent vice (in which expression I include bad packing) of the goods themselves is axiomatic."
- (2) A common carrier ceases to have the liability of an insurer after the goods arrive at their destination and he gives notice to the consignee of their arrival. If the consignee fails to take delivery of the goods or any part of them after such notice within a reasonable time, the carrier continues to have the liability of an ordinary bailee only in respect of the goods lying in his custody and will not be liable for any loss or damage unless the same is caused by his own negligence.³ The carrier

¹ *Hudson vs. Baxendale*, (1857) 27 L.J. Ex. 93; *Nugent vs. Smith*, (1876) C.P.D. 423; *Gould vs. S. E. & C. Ry.*, (1920) 2 K.B. 186; *Great Northern Ry. vs. L. E. P. Transport and Depository*, (1922) 1 K.B. 742.

² (1920) A.C. 324 at p. 333.

³ *Mitchell vs. Lancashire and Yorkshire Ry. Co.*, L.R. 10 Q.B.D. 250.

may also expressly agree to store the goods on their arrival at the destination in which case also the liability of the carrier will be that of an ordinary bailee only.¹

- (3) A common carrier may, by entering into special agreements with the consignor, exempt himself from liability for all loss and damage including those occasioned by his own negligence, or limit his liability to a particular kind or particular kinds of loss and damage. It is doubtful if a common carrier can, by a special agreement, relieve himself of liability for any loss caused by his own criminal act or that of his agents; for such an agreement would be void as against public policy or illegal. But the mere insertion of a general clause which exempts a carrier from liability for any loss of or damage to the goods entrusted to him will not exempt a carrier from liability for any loss or damage occasioned by his own negligence or that of his servants or agents unless such exemption is expressly provided for in plain, express and unambiguous terms by inserting in the special agreement something equivalent to what is known as the negligence clause². In England a special agreement limiting the liability of a carrier was provided for by carriers most frequently by inserting in newspapers, or distributing in hand-bills or, putting up in their offices a notice that they would not be liable for any property beyond a certain value, unless a special premium was paid for the insurance of the goods at the time of delivery. If this notice was brought to the knowledge of the consignor at the time the goods were delivered to the carrier, the consent of the consignor to the terms of the notice was implied and the carrier became entitled to the protection stipulated in the notice³. In order to avoid the strict common law liability of an insurer carriers were continually devising new types of agreements whereby they sought to reduce the liability of a carrier almost to nothing to the prejudice of the public.

¹ *Van Sall vs. S. E. Ry. Co.*, (1862) 31 L.J.C.P. 241.

² *Price & Co. vs. Union Lighterage Co.*, (1904) 1 K.B. 412.

³ *Mayhew vs. Bates*, (1825) 3 L.J. (O.S.) K.B. 106; *Nicholson Willam*, (1804) 5 East 507.

The carriers Act of 1865 was, therefore, designed to relieve the strict liability of carriers as well as to restrict their powers to make one-sided special contracts.¹

Exceptions under the Carriers Act :

\ The carriers Act of 1865 affects the common law liability of a carrier as follows. For the purpose of defining the liabilities of a common carrier it divides articles which may be consigned into two categories, namely (1) the Scheduled articles and (2) the non-scheduled articles. The scheduled articles are those enumerated in the schedule to the Act and which are unusually valuable or unusually perishable,² i.e., gold, silver, jewellery, silk, paintings, engravings, title deeds, currency notes or coins, bills, hundis and etc. The non-scheduled articles are those which are not included in the schedule to the Act and which are of an ordinary kind e.g., wheat and rice and not unusually valuable or perishable.³

(1) As regards the scheduled articles the carriers Act, 1865 prescribes the liability of a common carrier as follows :—

(a) A common carrier is not liable for any loss or or damage to a scheduled article exceeding Rs. 100/- in value excepting when it is caused by a criminal act of the carrier, his servants, or agents, unless the value and description of the article is declared by the consignor or his duly authorised agent at the time when the goods are delivered to the carrier whether such loss or damage is caused by the negligence of the carrier or not.⁴ In *Narang Rai Agarwalla v. River Steam Navigation Co., Ltd.*⁵ the plaintiff sued the River Steam Navigation Co., Ltd., for the loss of a few bundles of Endi silk (which is a scheduled article), delivered to it at Gauhati for transmission to Calcutta via E. B. Ry. The amount of loss exceeded Rs. 100/- in value. It was held that the River Steam Navigation Co., was

¹ Vide Sir Henry Maine's speech before the India Council in introducing the Carriers Bill in the *Gazette of India*, supplt., 2-12-1864.

² Vide Sir Henry Maine's Speech, *Ibid.*

³ Vide Sir Henry Maine's Speech, *Ibid.*

⁴ Carriers Act, 1865, Ss. 3 & 8.

⁵ 111 C.W.N. 1071.

not liable for the loss as the plaintiff failed to declare the value and description of the goods at the time of delivery.

- (b) A common carrier is allowed to charge an additional rate for undertaking the increased risk of carrying a scheduled article provided a scale of charges containing the additional rate is publicly exhibited in his place of business in English as well as the vernacular language of the place¹.
 - (c) A common carrier is liable for any loss of or damage to a scheduled article entrusted to him for carriage and is bound to return any sum which might have been paid as the charge for carriage, where the consignor or his agent has properly declared the value and description of the article and has paid or agreed to pay the increased rate, if any, and the carrier cannot limit his liability in this respect by any special agreement².
- (2) As regards non-scheduled articles, a common carrier may limit his liability for the loss of or damage to goods, entrusted to his care, by special contracts signed by the owner or his duly authorised agent excepting when such loss or damage is caused by the negligence or criminal act of the carrier or any of his agents or servants³. As Sir Lawrance Jenkins observed in *British and Foreign Marine Insurance Co., Ltd. v. India General Navigation and Railway Co., Ltd.*,⁴ "the liability of a common carrier for the loss of goods, not being of the description contained in the Schedule, may be limited by special contract signed by the owner, save when such loss shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants" It is clear that any special agreement which purports to exempt the carrier from liability for his own negligence or criminal act or that of his servants or agents is void

¹ Carriers Act, 1865, S. 4.

² *Ibid.*, Ss. 3 & 6; *British and Foreign Insurance Co. Ltd. v. India General Navigation and Ry. Co. Ltd.*, 38 Cal. 28 (42).

³ Carriers Act, Ss. 6 & 8.

⁴ 38 Cal. 28.

and inoperative as being illegal and in contravention of the carriers Act¹. In *India General Steam Navigation Co. v. Joy Kristo Saha*,² the defendant I. G. S. N. Co., received the goods of the plaintiff for carriage under conditions contained in a forwarding note signed by the plaintiff. One of such conditions stipulated that the defendants would not be liable in the case of loss or damage arising from certain kinds of accidents and also from the negligence of the defendants. The goods were lost as a result of the flat carrying the goods being sunk by collision with an underwater snag, the existence of which could not have been ascertained by any precautions on the part of the defendants. It was held that the defendants could limit their liability by special agreement as the goods were not of the scheduled class but not so as to relieve them of their liability for their own negligence and that the condition which purported to do so was, therefore, bad. On the facts, however, it was held that the defendants were not liable as the loss was due to one of the excepted conditions which were severable from the condition which was bad and not due to the negligence of the defendants.

Carriers Act, how far it modifies the Liability of a Common Carrier under the Common Law :

As regards scheduled articles whose value and description have been declared, the liability of a common carrier under the carriers Act, 1865 is absolute and higher than that under the common law for he cannot limit his liability by any special agreement, nor can he, it seems, claim protection under any of the common law exceptions *e.g.*, an act of god or an act of the king's enemies. As regards scheduled articles whose value and description have not been declared the liability of a common carrier is much lighter than that under the common law for he is only liable if the loss or damage does not exceed Rs. 100/- in value or if the loss or damage is caused by his criminal act or that of his agents. It is not clear as to what the liability of a common carrier would be in the case

¹ Carriers Act, 1865, S. 8; *River Steam Navigation Co. Ltd. v. Jamunadas Ramkumar*, 59 Cal. 472 (474).

² Cal. 39.

of loss or damage not exceeding Rs. 100/-, in respect of scheduled articles whose value and description have not been properly declared. It seems that the liability of the carriers would be absolute unless the articles are consigned as ordinary or non-scheduled articles under special agreements.

As regards non-scheduled articles the liability of a common carrier is the same as under the common law excepting that he cannot contract out of his liability for loss or damage caused by his negligence by any special agreement which is permissible under the common law.

Presumption of Negligence :

Under the Carriers Act, 1865, a common carrier is liable absolutely for any loss or damage caused by his negligence excepting in the case of scheduled articles whose value and description have not been properly declared and, as we have seen, he cannot limit this liability by any special agreement¹. Where in a suit brought against a common carrier, the common carrier wants to relieve himself from liability for the loss or damage for which he is sued under any special agreement, it is for him to prove the absence of negligence². The burden of proof of absence of negligence is thus thrown on the common carrier on the principle that the loss or damage to the goods is *prima facie* proof of negligence and the Court must presume negligence in the absence of any proof to the contrary³.

Suits against a Common Carrier :

Any person who has an interest in the goods consigned and suffers loss of or damage to the goods can maintain a suit against the common carrier to whom the goods were entrusted for carriage whether he was a party to the contract of carriage or not or in the language of law whether there was privity between him and the carrier or not⁴. The reason is explained by the Privy Council in *Irrawaddy Flotilla Co. v. Bhagwandas*⁵, in the following words

¹ S. 8 ; *I. G. S. N. Co. vs. Joy Kristo Saha*, 17 Cal. 39 ; *R. S. M. Co. Ltd. vs. Jamunadas Ramkumar*, 59 Cal. 472.

² Carriers Act, 1865, S. 9.

³ *The River Steam Navigation Co. vs. Choutmull Doogar*, 26 Cal. 398.

⁴ *K. C. Dhar vs. Ahmed Bux*, 60 Cal. 879 at p. 889.

⁵ 18 I.A. 121 at p. 129.

—“The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. ‘A breach of this duty,’ says Dallas C. J. (*Betherton v Wood*)¹ is a breach of the law, and, for this breach, an action lies founded on the common law, which action *wants not the aid of a contract* to support it.” Thus a consignee to whom the property in the goods has passed or a mortgagee of the goods or even an insurer who has paid the owner for the loss of the goods², can maintain an action against the carrier for loss or damage to the goods.

Requirement of notice :—No suit can be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff³. Notice to a local agent of the carrier is valid notice even though such local agent may also be the agent for another carrier⁴.

Limitation :—A suit against a carrier, which includes a common carrier, for compensation for loss of or injury to goods must be instituted within one year of the time when the loss or injury occurs and a suit for compensation for non-delivery of or delay in delivery of the goods must be instituted within one year of the time when the goods ought to be delivered⁵.

Private Carriers :

A private carrier has been defined by Avory J. in *Watkins v. Cottell*⁶ as one whose trade is not that of conveying goods from one person or place to another, but who undertakes upon occasion to convey the goods of another and receives reward for so doing. A private carrier differs from a common carrier in that he is

¹ (1821) 3 Brod. & B., 54.

² *British & Foreign Marine Insurance Co. Ltd. vs. I. G. N. & Ry. Co. Ltd.*, 38 Cal. 28.

³ *Carriers Act, 1865, S. 10; R. S. N. Co. Ltd. vs. Kashi Prosad*, 8 C.L.J. 192.

⁴ *India General Navigation & Ry. Co. vs. Girdharilal Gobardhan Das*, 54 Cal. 430.

⁵ *Limitation Act, Articles 30 & 31.*

⁶ (1816) 1 K.B. 10 at p. 14.

either one (a) who undertakes to carry for reward on occasions but not as a public employment or (b) one who, while inviting all and sundry to employ him as a carrier for reward, reserves the right to accept goods at his option¹.

Liability of a Private Carrier :

The liability of a private carrier is like that of a bailee. He is liable only for such loss or damage as is caused by his negligence *i.e.*, by his failure to take as much care of the goods entrusted to him as a man of ordinary prudence would, under similar circumstances, take of his own goods². But a private carrier is not liable if the owner keeps the goods under his control *e.g.*, when a passenger carries his own luggage, or if the loss is as likely to have arisen from the misconduct of the owner or his want of care, as from that of the carrier³.

Gratuitous Carrier :

A person who undertakes to carry goods or passengers gratuitously *i.e.*, without reward, is called a gratuitous carrier. No action can be maintained against a gratuitous carrier for refusing to carry goods or passengers after he has undertaken to do so for the contract is *nudum actum i.e.*, unenforceable for want of consideration.⁴ But once a gratuitous carrier accepts goods for carriage he is in the position of a bailee and his liabilities become the same as that of a private carrier, *i.e.*, he will be liable for any loss or damage caused by his own negligence or that of his agents. As. Wills J. observed in *Sketton v. L. & N. W. Ry. Co.*⁵ "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly *but not if he neglects to perform it*. Such is the result of the decision in *Coggs v. Bernard*."

Carriers of Passengers :

Carriers of passengers may be either (a) a common carrier or (b) a private carrier or (c) a gratuitous carrier. The Carriers Act,

¹ *Belfast Ropework Co. vs. Rushell*, (1918) 1 K.B. 210.

² Contract Act, Ss. 151 & 152 ; *Coggs vs. Bernard* 1 Sm. L.C. 12th ed. 191.

³ *Whalley vs. Wray*, 3 Esp. 74.

⁴ *Coggs vs. Bernard*, *supra*.

⁵ L.R. 2 C.P. 636.

1865, does not affect their position as under the common law which still governs them. We shall discuss their position below

Common carrier of passengers :—A person who is engaged in carrying passengers as a regular business and who holds himself out as ready to carry between places on a certain route all person indifferently who accept his published terms is a common carrier of passengers¹. He is regarded as a common carrier because he is bound to carry any member of the public who wants to travel unless he can justify his refusal to do so under any one of the following common law exceptions, namely, (a) where the person offering himself to be carried is unfit or (b) where such person is unwilling to pay the stated fare or (c) where there is no accommodation. A bus company, or a tramway company which carries every one indiscriminately may be regarded as common carriers.

The liability of a common carrier of passengers is different to that of a common carrier of goods in that he does not stand in the position of an *insurer* for the safety of the passengers he carries. He does not warrant that the carriage in which the passengers travel is free from all defects likely to cause peril, although those defects may be such that no skill, care, or foresight could have detected their existence².

His duty is only to take due care and exercise due diligence in carrying the passengers and he will be held liable only in case of his negligence, *i.e.*, if injury is caused to a passenger by any defect which could have been detected by the exercise of reasonable care and diligence *e.g.*, where a passenger is injured by the tender of the train being thrown off the line as a result of a defect in the tyres of one of the wheels of the tender³. Thus Sir James Mansfield observed in *Christie v. Griggs*,⁴ "there is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that *as far as human care and foresight could go* he would provide for their safe conveyance."

The liability of a common carrier for passengers is the same

¹ Hari Rao's Indian Railways Act, p. 734.

² *Readhead vs. Midland Ry. Co.*, (1869) 4 Q.B. 379 at 389.

³ *Ford vs. London and South Western Ry. Co.*, 2 F. & F. 730.

⁴ 2 Camp. 79.

in relation to passengers who travel free or without ticket as that for passengers who travel with ticket provided the former does so with the knowledge and consent of the carrier.¹ But if a passenger travels free without the knowledge and consent of the carrier, he is regarded as a mere trespasser and the carrier is not liable for any injury caused to him whether by negligence of the carrier or not. In *G. N. Ry. Co. v Harrison*² a newspaper reporter held a free railway ticket in his own name. Another reporter, while travelling with the former's free ticket, was injured. The railway had knowledge of a practice whereby one reporter frequently travelled with another's ticket and had permitted the same. It was held that the injured reporter was entitled to recover damage for his injury as he was no trespasser, his irregular user of the railway having been permitted by the railway.

A common carrier of passengers is not liable for the injury caused to any passenger where the injury is caused as much by the negligence of the passenger as of the carrier³.

Private Carrier of passengers—A person who carries passengers for reward on occasions or who, while inviting all and sundry for the purpose of being carried, reserves the right to refuse to carry anyone at his option is to be deemed a private carrier of passengers⁴. His liability is the same as that of a common carrier of passengers.

Gratuitous carrier of passengers: A person who undertakes to carry anyone gratuitously *i.e.*, without reward is to be regarded a gratuitous carrier. He is not bound to carry anyone but once he does carry anyone he will be liable if an injury is caused to the latter by his negligence.

Railways whether Common Carriers :

In India the railways stand on a different footing as compared to common carriers so far as their liabilities are concerned. Under

¹ *G. N. Ry. Co. vs. Harrison*, 23 L.J. Ex. 308 (310)

² *Supra*

³ *Jehangir Muncherji vs. B. B. & Co. I Ry. Co.*, 37 Bom. 575. In this case a passenger injured his arm by projecting it out of the window of a running train and colliding against the door of a stationary train which was kept open by the carrier negligently. It was held that the passenger was as much negligent by projecting his arm—as the carrier.

⁴ *Per Avery J. in Watkins vs. Gattel*, (1916) 1 K.B. 10 at 14.

S. 72 of the Railways Act, 1890, the liability of railways is defined to be that of a bailee as laid down in Ss. 151, 152 and 161 of the Contract Act and not that of an insurer as under the common law in respect of the loss, deterioration or destruction of goods and animals carried by them. But although a railway company is not a common carrier so far as its liability is concerned, yet it is regarded as a common carrier so far as its duties to the general public are concerned. Thus it cannot refuse to carry goods tendered to it without the justification recognised in common law¹ or make unreasonable delay in delivering the goods or refuse to deliver them without justification." As Staples, A.C.J. observes in *Chhoglal vs. Secretary of State*², "When once a railway company has held itself out to be a common carrier, it is under a common law liability to carry goods to all places to which it professes to carry and to accept all goods which are reasonably offered to it for conveyance to and from the places to which it professes to carry." A similar view was expressed by Walsh J. in *Sohan Pal vs. E. I. Ry. Co.*³ in the following words "A railway company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods".

Even as regards the liability of a railway company, a railway company has been held liable as a common carrier for any damage suffered by the owner of the goods which has been occasioned by reason of any breach of common law duty by the carrier excepting when such damage is caused by the loss, destruction or deterioration of the goods. The liability of a railway company is like that of a bailee only when such liability arises from the loss, destruction or deterioration of the goods or animals carried by it and not otherwise. Thus the liability of a railway for non-delivery of goods which have not been lost or damaged or for undue delay in delivering goods or for injury to the persons of passengers would not be governed by the Railway Act, 1890, but by the common law.⁵

G. ¹ See *supra*.

² *Fazl Ellahi vs. E. I. Ry. Co.*, 43 All. 623.

³ A.I.R. (1933) Nag. 262 at p. 262.

⁴ 44 All. 218 at 227 (F.B.).

⁵ *East India Ry. Co. vs. Jogpat Singh*, 51 Cal. 515.

Liability of Railways :

In India the liability of a railway administration for the loss, destruction or deterioration of animals or goods delivered to it for carriage is not like that of an insurer under the common law but like that of a bailee under Ss. 151, 152 and 161 of the Contract Act.¹ The duty of a railway administration is to take reasonable care only and it will be liable for the loss, destruction or deterioration of goods or animals entrusted to it in the following cases only :—

- (a) If the goods or animals are lost or damaged owing to the neglect of the railway or its servants to take such reasonable care as a man of ordinary prudence would, under similar circumstances, take of his own goods.²
- (b) If the goods or animals are lost or damaged for any reason after the railway has made default in delivering the goods or animals at the proper time.³

But this general liability of a railway as a bailee is further limited in the following cases, namely (a) carriage of articles mentioned in the second schedule to the Railways Act, 1890, (b) carriage of animals, (c) carriage of passenger's luggage and (d) carriage under special agreements known as *risk notes*.

- (a) *Carriage of Articles mentioned in the second schedule to the Act* :—A railway administration is not liable for the loss, destruction or deterioration of any parcel or package, containing any article of special value mentioned in the second schedule to the Railways Act e.g., gold, silver, silk pearls, jewellery, watches, Government and other securities, paintings, engravings and etc., the value whereof exceeds Rs. 100/- unless the person sending or delivering the same declares the value and contents thereof at the time of the delivery of the package or parcel to the railway for carriage and paid or agreed to pay an additional rate as insurance against the extra risk of carrying the same, if so required by the railway. If the consignor does not declare the value and contents of a package containing such article exceeding Rs. 100/- in value or does not pay the

¹ Railways Act, 1890, S. 72(1).

² Contract Act, Ss. 151 & 152.

³ Ibid, S. 161.

additional rate when required by the railway, he cannot recover any loss or damage even though it may be caused by the negligence of the railway or its servants.¹ Where such value and contents have been declared the railway is liable to pay upto the declared value if any loss or damage occurs, but the burden of proving the extent of the loss or damage is upon the person who claims compensation.² A railway may, before accepting any parcel or package declared to contain such an article examine the contents of the parcel or package in order to ascertain that it really contains such an article.³ When a consignor sends any such article declared as such without paying the additional rate the practice of a railway is to take from the consignor an agreement in risk note Form called X or Y whereby the consignor agrees to absolve the railway of all liability in consideration of the articles being carried at the ordinary rate.

A specimen form in which the consignor has to make a declaration as to the value and contents of a package containing such an article is given below :—

FORM OF DECLARATION UNDER S 75

Declaration to be signed by the sender of excepted articles.

| | |
|--|----------------------------------|
| The accompanying | .. |
| weighing | .. |
| address to | .. |
| contains the articles detailed below of the aggregate value of Rs. | |
| (in words) | .. |
| Rs. As. | |
| Dated | 19 . <i>Signature of Sender.</i> |

Parcels or goods must be securely packed in a manner approved by the Station Master before they are accepted for despatch. Articles packed in cloth should bear seals (at intervals not exceeding 3 inches along each line of sewing) showing distinct impressions of some device other than that of current coin.

The Railway reserve the right to open packages containing excepted articles to ascertain that the articles are sound and in good condition. All appliances in packing, etc., must be provided by the sender or receiver, who will see and be responsible that the packages are properly packed and repacked.

¹ Railways Act, 1890, S. 75 (1).

² Ibid, S. 75 ((2).

³ Ibid, S. 75 (3).

pensation for such loss or injury.¹ It should be noted, however, that the railway will be liable as a bailee only when such loss or injury results from the negligence or misconduct of the railways or its servants and if the animal dies or gets injured from its own inherent vice *e.g.*, where it jumps out of a truck and kills itself or kicks about and injures its legs.² But the onus of proving absence of negligence is on the railway where it is proved that the animal which dies or gets injured was fit and healthy at the time it was loaded in a truck.³

- (c) *Carriage of Passengers' Luggages* :—A railway administration is not liable for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt therefor. This means that to hold a railway liable for the loss of a passenger's luggage the first requisite is that the passenger must have booked it and obtained a receipt thereof. But it does not follow that the railway is liable in every case of loss of or damage to a passenger's luggage. Its liability in this respect is also like that of a bailee and will arise only if the loss or damage is caused by its own negligence or misconduct or that of its servants.⁴ Thus if the passenger takes his luggage completely out of the control of the railway *e.g.*, by keeping it in his compartment and the luggage is lost by his own negligence the railway will not be liable for the loss.⁵

- (d) *Carriage under special agreements or risk notes* :—A railway administration can limit its liability even as a bailee by entering into a special agreement with the consignor or his duly authorised agent. Such a special agreement, in order to be effective, must be in writing signed by or on behalf of the person sending or delivering the goods to the railway and must be in a form approved by the Governor-General in Council⁶. Special agree-

¹ Ibid, S. 73 (3).

² *Blower vs. G. W. Ry. Co.*, (1887) 4 T.L.R. 7.

³ *Smith vs. Midland Railway Co.*, 57 L.T. 813.

⁴ *Velyet Hussain vs. B. & N. W. Ry. Co.*, 13 C.W.N. 847.

⁵ *Jenkins vs. Southampton Steam Packet Co.*, (1919) 2 K.B. 135.

⁶ Railways Act, 1890, S. 72 (2) (a) & (b).

ments of this kind are known as risk notes and they purport to exempt the railway from even the liability of a bailee under certain conditions in consideration of the railway granting the consignor some concession in the shape of charging him a reduced rate of freight. There are several kinds of risk notes which have been approved by the Governor-General in Council and which are in current use, namely, risk notes A, B, C, D, E, F, G, H, X and Y. Risk notes C, X and Y exempt the railway from liability in every case of loss and damage, however caused. Risk notes A, B, D, G and H absolve the railway of liability for any loss or damage excepting where it is caused by the misconduct of the railway's servants. Risk notes E and F limit the liability of the railway to specified sums agreed to as the maximum payable by the railway in respect of loss of or damage to certain classes of animals carried under the notes and relieve the railway of liability to pay even limited sums unless the loss or damage is caused by the negligence or misconduct of the railway company or that of their servants. We may study these risk notes in detail below —

Risk note "A" :

When goods which are tendered to a Railway for carriage are either in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit the practice of the railway is to take an agreement from and signed by the person delivering in risk note form "A", the effect of which is to relieve the Railway of all liability for any condition in which the goods may be delivered to the consignee or for any loss or damage excepting when such loss or damage is caused by the misconduct of the Railway's servants. The form of Risk note "A" is given below :—

NEW RISK NOTE FORM A.

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit.)

STATION
193 .
me

Whereas the consignment of tendered by—as
per Forwarding Order No of (date) for despatch
by the Railway Administration to station
under Railway Receipt No of (date) is in bad condition
and
—liable to damage, leakage or wastage in transit as follows:—

I
—, the undersigned, do hereby agree and undertake to hold the said
We
Railway Administration over whose Railway the said goods may be carried
in transit from station to station harmless and
free from all responsibility for the condition in which the aforesaid goods
may be delivered to the consignee at destination and for any loss arising
from the same *except upon proof that such loss arose from misconduct on
the part of the Railway Administration's servants*

*This agreement shall be deemed to be made separately with all Railway
Administrations or transport agents or other persons who shall be carriers
for any portion of the transit*

| | | |
|-------------|---------------------|---------------|
| WITNESS | Signature of sender | |
| (Signature) | Rank or { | Father's name |
| (Residence) | | Caste |
| | | Age |
| WITNESS | | |
| (Signature) | Profession | |
| (Residence) | Residence | |

It should be noted that though attestation by witness is provided for in risk note A, yet it is not essential¹ The onus of proving misconduct on the part of the Railways servants is on the person who claims compensation for any loss or damage² Misconduct is not negligence. It is some positive act or some wilful omission to do something which it is the duty of the Railway to do and is opposed to accident or negligence³

RISK NOTE "B"

When a consignor sends goods or animals at a "special reduced or "owner's risk rate" instead of an alternative "ordinary" or "risk

¹ Ardeshr Bhikaji Tamboli v. G. I. P. Ry. Co., 52 Bom. 169 (174)

² M. & S. M. Ry. Co. Ltd v. Ravi Singh Deep Singh, A.I.R. (1935) Cal. 811 and 812.

³ Ralliram Dingra vs. The Governor-General in Council, 48 CWN 554

acceptance" rate, the practice of the Railway Administration to which the goods or animals are delivered for carriage is to accept the goods or animals under an agreement in risk note form B signed by the sender which exempts the Railway from all liability for any loss of or damage to the goods or animals excepting when such loss or damage is caused by the misconduct of the Railway's servants. The burden of proving misconduct of the Railway's servants in case of any loss or damage is on the person who claims compensation. But in the case of non-delivery, of the whole of a consignment or of the whole of one or more packages forming part of the consignment not due to fire or accident or in the case of pilferage from such package or packages, the Railway administration must in the first instance disclose how it dealt with the consignment and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct. If from such disclosure misconduct cannot be inferred the person claiming compensation must prove misconduct. The form of Risk Note "B" is given below :-

NEW RISK NOTE FORM B :

[Approved by the Governor General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890.]

(To be used when the sender elects to despatch at a "special reduced" or "owner's risk" rate, articles or animals for which an alternative "ordinary" or "risk acceptance" rate is quoted in the Tariff.)

STATION.
193 .

Whereas the consignment of _____
tendered by _____
me
as per Forward-
us
ing Order No _____ of _____ (date) for despatch by the
Railway Administration to _____ station, under Railway Receipt
No _____ of _____ (date) is charged at a special reduced rate
I
instead of at the ordinary tariff rate chargeable for such consignment, _____

we
the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants; provided that in the following cases :-

- (a) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, pro-

packed otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire ; .

- (b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a), where such pilferage is pointed out to the servants of the Railway Administration on or before delivery ;

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called, on to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall be upon the consignor.

This agreement shall be deemed to be made separately with all Railway Administration or transport agents or other persons who shall be carriers for any portion of the transit.

| | | | |
|------------------|---------|-----------------------|----------|
| WITNESS. | | Signature of sender.. | |
| (Signature)..... | | Father's Name..... | |
| | Rank or | | |
| (Residence)..... | | Caste..... | Age..... |
| WITNESS. | | | |
| (Signature)..... | | Profession..... | |
| (Residence)..... | | Residence..... | |

(To be filled in by Booking Clerk.)

Description of packing.....
 Date..... Booking Clerk.

RISK NOTE "C"

When goods, which should normally be carried in covered wagons, carts or boats and which are liable to damage if not so carried, are accepted for carriage in open wagons, carts or boats at the sender's request, the Railway Administration to which the goods are tendered accept the goods to be so carried under an agreement in risk note form "C" signed by the sender which exempt the Railway from all liability, however caused, even though no reduced rate is charged by the railway in this case. But the Railway is exempted from liability only if the loss occurs during transit. If any loss occurs after the transit has terminated and the goods have reached their destination, the Railway will be liable as a bailee if the loss is occasioned by its negligence or misconduct or that of its servants. The form of Risk Note C is given below :—

RISK NOTE FORM C.

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890.]

(To be used when, at sender's request, open wagons, carts or boats are used for the conveyance of goods liable to damage, when so carried, and which, under other circumstances, would be carried in covered wagons, carts or boats).

STATION.
193 .

Whereas the consignment of _____ tendered by _____ as
per Forwarding Order No. _____ of _____ (date), for despatch by the
Railway Administration or their transport agents or carriers
to _____ station under Railway Receipts No. _____ of _____
(date), is at _____ request loaded in open wagons, carts or boats, to be
our _____

I _____
do hereby agree and under-
take to hold the said Railway Administration and all other Railway Ad-
ministrations working in connection therewith, and also all other transport
agents or carriers employed by them respectively, over whose Railways or
by or through whose transport agency or agencies the said goods may be
carried in transit from _____ station to _____ station
harmless and free from all responsibility for any destruction or deteriora-
tion of, or damage to, the said consignment which may arise by reason of
the consignment being conveyed in open wagons, carts or boats during
transit over the said Railway or other Railways working in connection
therewith or during transit by any other transport agency or agencies
employed by them respectively.

WITNESS.
(Residence)

(Signature)

WITNESS.
(Signature)
(Residence)

Signature of sender
Rank or { Father's name .
Caste Age .
Profession .
(Residence)

RISK NOTE "D" :

When a sender consigns dangerous, explosive or combustible articles at a "special reduced" or 'owner's risk' rate instead of an alternative "ordinary" or "risk acceptance" rate quoted in the tariff, the Railway Administration to which the goods are tendered accept the same for carriage under an agreement in risk note form "D" which relieves the railway from all liability for any loss or damage excepting when such loss or damage is caused by the misconduct

of the railway or its servants. This risk note is very similar to risk note "B" in form. The form of risk Note D is given below :—

RISK NOTE FORM D :

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890.]

(To be used when the sender elects to despatch at a "special reduced" or "owner's risk" rate, dangerous, explosive or combustible articles for which an alternative "ordinary" or "risk acceptance" rate is quoted in the Tariff).

STATION.
193 .

Whereas the consignment of

... ..
... ..tendered by me
... ..
as per Forwarding Order No. of (date) for
despatch by the Railway Administration to
station, under Railway Receipt No. of (date) is charged
at a special reduced rate instead of at the ordinary tariff rate chargeable

I
for such consignments, —, the undersigned do, in consideration of such
we

lower charge, agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants, provided that in the following cases :—

(a) *Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the rules and regulations for the time being in force for the packing of dangerous explosive or combustible articles, where such non-delivery is not due to accidents to trains or to fire ;*

(b) *Pilferage from a package or packages forming part of the said consignment properly packed as in (a), when such pilferage is pointed out to the servants of the Railway Administration on or before delivery ,*

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

I

— further agree to accept responsibility for any consequences to the
we

property of the aforesaid Railway Administration, or to the property of other persons that may be in the course of conveyance, which may be

caused by the explosion of, or otherwise by, the said consignment, and that all risk and responsibility whether to the Railway Administration, to their servants or to others, remain solely and entirely with ^{me} —.

This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit.

| | | |
|-------------|---------------------|-------------------------|
| WITNESS. | Signature of sender | |
| (Signature) | Rank or | { Father's name . . . |
| Residence | | { Caste . . . Age . . . |
| WITNESS. | | |
| (Signature) | Profession | |
| (Residence) | Residence | |

(To be filled up by Goods Clerk.)

Particulars of packing
Date Goods Clerk.

RISK NOTE "E" :

An agreement in risk note form "E" signed by the consignor is used by a Railway administration when booking elephants or horses of a declared value exceeding Rs. 500/- a head, mules, camels or horned cattle Rs. 50/- a head, donkeys, sheep, goats, dogs or other animals Rs. 10/- a head, without the payment of the additional rate as authorised by S. 73 of the Railways Act. When animals are booked under this risk note the Railway is liable only upto the amounts fixed by S. 73 of the Railways Act, namely, Rs. 500/- a head for elephants or horses, Rs. 50/- a head for mules, camels, or horned cattle and Rs. 10/- a head for donkeys, sheep, goats, dogs and other animals, provided any loss or damage is caused by its negligence or that of its servants. The form of Risk Note E is given below :—

RISK NOTE FORM E :

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890.]

(To be used when booking elephants or horses of a declared value exceeding Rs. 500 a head, mules, camels or horned cattle Rs. 50 a head ; donkeys, sheep, goats, dogs or other animals Rs. 10 a head, without payment of the percentage on value authorized in section 73 of Act IX of 1890, as amended by section 4 of Act IX of 1896).

STATION.

..193 .

Whereas ^I — the undersigned, have tendered to . . . the Railway
we

Administration for despatch to _____ station the animal (s)
 mentioned below, for which I _____ have received Railway ticket No
 of this date, we _____

And whereas I _____ have paid to the said Railway Administration only
 we _____ their ordinary freight charge without any extra charge for insurance,

And whereas the said Railway Administration for such ordinary freight charges holds itself responsible for proved damages to (each of) the said animal (s) caused by neglect or misconduct of its servants to the extent of the value mentioned below,

And whereas the said Railway Administration has notified that it will not be liable for damage or loss arising from fright or restiveness, or delay not caused by the negligence or misconduct of its servants, and such condition is accepted by me _____,
 us _____

I _____, the undersigned do in consideration of the foregoing terms and we _____ conditions, hereby agree and undertake that the responsibility of the said Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said animal (s) may be carried in transit from _____ station to _____ station, for the loss, destruction or deterioration of or damage to, (each of) the said animal (s) shall not exceed the value mentioned below —

| Animals | | | Animals | | |
|---------|---------------|---------------|---------|---------------|---------------|
| No. | Description | Value of each | No. | Description | Value of each |
| | | Rs | | | Rs |
| | Elephants | 500 | | Donkeys | 10 |
| | Horses | 500 | | Sheep | 10 |
| | Mules | 50 | | Goats | 10 |
| | Camels | 50 | | Dogs | 10 |
| | Horned cattle | 50 | | Other animals | 10 |

WITNESS
 (Signature)

(Residence)
 WITNESS

(Signature)
 (Residence)

Signature of sender

Rank or { Father's name
 Caste Age

Profession
 Residence

Note.—The words in *italics* should be scored out by the booking clerk when only one animal is sent.

RISK NOTE "F" :

When horses, mules and ponies are tendered for despatch in cattle truck or horse wagons instead of in horse boxes, the practice of a Railway Administration is to book them subject to an agreement in risk note Form "F" signed by the consignor which exempt the Railway from all liability in excess of Rs. 50/- per head for any loss, destruction or deterioration of or damage to any such animal despatched under the note. But the Railway will not be liable even to pay for this limited liability unless the loss or damage is caused by negligence or misconduct or that of its servants. The reason for this limitation of liability is that the rate for carriage in cattle truck or horse wagons is lower than the horse-box rate. The form of Risk note F is given below :—

RISK NOTE FORM F :

[Approved by the Governor General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890.]

(To be used when booking horses, mules and ponies, tendered for despatch in cattle-truck or horse-wagons instead of in horse-boxes).

STATION.
193 .

Whereas the consignment of

me
tendered by —, as per Forwarding Order No of
us

(date), for despatch by the Railway Administration to
station, under Railway Receipt No. of

me
(date), at —, request and in consideration of the payment by — of
our us

cattle-truck or horse-wagon rate in lieu of horse-box rate, loaded in cattle-trucks or horse-wagons instead of horse-boxes to be so carried to destination ;

And whereas the said Railway Administration has notified that it will not be liable for damage or loss arising from fright or restiveness, or delay not caused by the negligence or misconduct of its servants, and such condition is accepted by me

us ;

I

we, the undersigned, do hereby agree and undertake to hold the said

Railway Administration and all other Railway Administrations working in connection therewith, over whose Railways the said animal (s) may be carried in transit from station to

harmless and free from all responsibility in excess of Rs. 50 (per head) for any loss, destruction or deterioration of, or damage to, the said consignment during transit over the said Railway or other Railways working in connection therewith.

| | | | |
|------------------|---------|--------------------------|----------|
| WITNESS. | | Signature of sender..... | |
| (Signature)..... | Rank or | Father's name..... | |
| (Residence)..... | | Caste..... | Age..... |
| WITNESS. | | | |
| (Signature)..... | | Profession..... | |
| (Residence)..... | | Residence..... | |

RISK NOTE "G" :

Risk note "G" is used as an alternative to Risk Note "D," when the sender desires to enter into a general agreement for a series of consignments instead of executing a separate Risk Note for each consignment. It is Risk Note "D" with slight alterations in the language so as to make it applicable to more than one consignment.

RISK NOTE "H" :

Risk Note "H" is used as an alternative to Risk Note "B," when the sender desires to enter into a general agreement for a series of consignments instead of executing a separate risk note for each consignment. It is in fact Risk Note "A" with only such alterations as are necessary to make it applicable to more than one consignment.

RISK NOTE "X" :

We have already seen that a Railway Administration is not liable for any loss of or damage to any article mentioned in the second schedule to the Railways Act, 1890, exceeding Rs. 100/- in value unless the consignor declares the value and contents of any consignment containing such an article and pays or undertakes to pay the additional rate, if required by the Railway Administration¹. Where the consignor declares the value and contents of such a consignment but does not pay or agree to pay the additional rate, the Railway accepts the consignment for carriage under an agreement in risk note Form "X," which relieves the Railway of all liability for any loss of or damage to the consignment, howsoever caused. The Railway need not take such a risk note, for even in the absence of a risk note, the Railway will not be liable for any loss or damage. But the Railway insists

¹ Railways Act, 1890, S. 75.

on it as a matter of practice. The form of risk Note "X" is given below :—

RISK NOTE FORM X :

(Approved by the Governor-General in Council Under Section 72(2) (b) of the Indian Railways Act, IX of 1890).

(To be used when the sender elects to despatch an "excepted" article or articles specified in the second schedule to the Indian Railways Act, IX of 1890, whose value exceeds one hundred rupees, without payment of the percentage on value authorised in section 75 of that Act)

Station
194

WHEREAS the Consignment of _____ tendered by _____ me _____ as per _____ us _____
forwarding Order No _____ (date) for despatch by the _____
Administration or their transport agents or carriers to _____ Station,
under Railway Receipt No _____ of _____ (date), is charged at the
ordinary rates for carriage, and whereas I/we, have been required to pay,
and elected not to pay, a percentage on the value of the consignment by
way of compensation for increased risk I/we, the undersigned do there-
fore agree and undertake to hold the said Railway Administration and all
their Railway Administrations working in connection therewith, and also
all other transport agents or carriers employed by them respectively over
whose Railways or by or through whose transport agency or agencies the
said goods may be carried in transit from _____ Station to _____
Station harmless and free from all responsibility for any loss destruction,
or deterioration of, or damage to, the said consignment from any cause
whatever before during and after transit over the said Railway, or other
Railway lines working in connection therewith or by any other transport
agency or agencies employed by them respectively for the carriage of the
whole or any part of the said consignment

WITNESS
(Signature)

(Residence)

(Signature)

(Residence)

WITNESS

Signature of sender

Rank or } Father's name
Caste Age

Profession

Residence

RISK NOTE "Y" :

Risk Note "Y" is used as an alternative to Risk Note "X," when the sender elects to enter into a general agreement for a term not exceeding six months for despatch of series of consignments containing excepted articles specified in the second schedule

to the Railways Act, 1890, exceeding Rs. 100/- in value without payment of the additional rate, instead of executing a separate risk note for each consignment. The form of Risk Note "Y" is the same as that of Risk Note "X" except certain minor alterations in the language in order to make it applicable to more than one consignment.

SUITS :

Notice under S. 77 of the Railways Act :—

No suit against a Railway Administration for the loss, destruction, or deterioration of animals or goods or for refund of overcharges in respect of animals or goods carried by the Railway can be instituted unless a previous notice in writing of such claim is given to the Railway Under S. 77 of the Indian Railways Act, 1890, within six months from the date of the delivery of the animals or goods for carriage.

*Persons entitled to sue :—*The person who can sue a Railway for any loss of or damage to goods or animals delivered to the Railway, is the person in whom the property in the goods or animals is vested. As Baron Parke puts it, "the person whose property the goods are is *prima facie* the party with whom the contract is made¹." Thus where the property in the goods still remains vested in the consignor after their delivery to the carrier, as where a vendor consigns the goods to the buyer reserving the right of disposal², the consignor is the only person who can sue. But where goods are delivered to a Railway by the seller for conveyance to the buyer and the receipt is made over to the buyer, the buyer alone, who is the consignee, can sue for any loss of or damage to the goods³. Similarly any person to whom the consignor has endorsed the railway receipt can institute a suit against the Railway for any loss or damage as he becomes entitled to the goods by virtue of such endorsement⁴.

Notice under S. 80 of the Civil Procedure Code :—

Where a Railway is a state Railway *i.e.*, administered by the

¹ Mullinson *vs.* Carver (1843) 1 L. T. (O. S.) 59;

² See Sale of Goods Act, *Supra*.

³ M. & S. M. Ry. Co. Ltd. *vs.* Rangaswami Chetti, A. I. R. (1924) Mad. 517.

⁴ Peare Lal Gopi *vs.* E. I. Ry. Co., 46 All. 691.

Government of India, any suit against the Railway must be brought against the Governor-General in Council after serving a notice under S. 80 of the Civil Procedure Code, specifying the cause of action, the names and addresses of the parties to the suit, and the relief claimed at least two months prior to the institution of the suit besides serving a notice to the Railway under S. 77 of the Railways Act. In default of serving a notice under S. 80 of the Civil Procedure Code, the suit must fail.

Limitation :—The period of limitation is the same as in the case of a suit against a common carrier.

Carriage by sea :

Contract of affreightment :—A shipper who wants to ship goods by sea has to enter into a contract with a ship-owner unless he possesses a ship himself. "When a ship-owner agrees to carry goods by water, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called a *contract of affreightment*, and the sum to be paid is called *freight*." A contract of affreightment may be (a) either contained in a document called a charterparty or (b) evidenced by a document called a *bill of lading*.

Charterparty :

When a ship-owner agrees to carry a complete cargo of goods for a shipper, or to furnish a ship for that purpose the *contract of affreightment* is almost always set out in a formal document called a *charterparty* which contains the terms and conditions under which the goods are shipped. A charterparty may either take the form of a lease or demise of the ship by the ship-owner to the shipper for the purpose of carrying the goods, the shipper hiring the ship for such purpose or contain an undertaking by the ship-owner to carry the goods, the shipper undertaking to provide a full cargo. The shipper under a charterparty contract is called the charterer.

Where a charterparty contract takes the form of a demise or lease of the ship to the charterer, the charterer becomes for the

¹ Scrutton on Charterparties and Bills of lading, 12th ed. p. 1.

time being the owner of the vessel and the master and the crew become for all purposes his servants and through them the possession of the ship becomes vested in the charterer. A charterer by way of demise has, therefore, all the rights and is subject to all the liabilities of a shipowner. But where the charterparty is not by way of a demise, all that the charterer acquires is the right to use the ship for loading and carrying his goods and the ownership and the possession of the ship remains in the shipowner and the master and the crew continue to be the employees of the shipowner. It is difficult to determine whether a charterparty is by way of a demise or an ordinary one and the tendency of courts in recent times has been against construing a charter as a demise or lease.¹ The true test seems to be as observed by Lord Esher in *Burnvull v. Gilchrist & Co.*² whether the owner has for the time parted with "the whole possession and control of the ship." Thus where a charter stipulated that the ship was "to be let for the sole use of charterers and for their benefit for six months the owners supplying all ship's stores, and paying crew's wages.," it was held that the charter was not a demise even though it uses the words "to be let etc." as the ship-owner did not part with the whole possession and control of the ship, having reserved the right to pay crew's wages³. But where a ship-owner purchased the ship for the purpose of selling it to the charterer on the terms that part of the purchase money would be paid at once and the balance on the expiration of the charter and where the charterparty provided that the ship was to be let to the charterer for four months, the charterer paying the wages of the captain and the crew it was held that the shipowner had parted with the possession and control of the ship and the charter was by way of a demise⁴.

A charterer may himself ship the cargo or enter into sub-contracts with separate shippers, who may ship cargo by the chartered ship under separate bills of lading.

¹ *Scrutton on Charterparties and Bills of Lading*, 12th ed. p. 5; per *Vanhan Williams, L.J.*, in *Herne Bay Co. vs. Hutton*, (1903) 2 K.B. at p. 689.

² (1892) 1 Q. B. 253; (1893) A. C. 8.

³ *Ones Coal & Iron Co. vs. Huntley* (1877), 2 C. P. D. 464.

⁴ *Burnvull vs. Gilchrist & Co.*, (1893) A.C. 8.

Effect of a charterparty by way of a demise :

It has already been noted that a charterer by way of demise has all the rights and is subject to all the liabilities of a shipowner and he is to be regarded as the owner of the ship *pro tempore* (i.e., for the time being) during the continuance of the charter. The effects of such a charterparty may be enumerated as follows¹ :—

- (a) The shipowner, being out of possession, would have no lien at co^{India} law on the goods shipped for the freight due^{er} as ^funder the charter
- (b) The shipowner^{of} having ceased to be the owner, would not be lⁱble to the shippers who ship goods through the charterer for any loss of or damage to the goods or for any acts of the master or the crew even if they did not know of the charter—
- (c) The master would be the agent of the charterer and delivery to him of goods bought by the charterer would deprive the unpaid seller of his right of *stoppage in transit* unless the bill of lading was made deliverable to the shipper or his order. Where the charter is not a demise, delivery to the master would be delivery to a carrier and the right of stoppage in transit would remain¹
- (d) A charterer by a demise would be regarded as a carrier within the meaning of the Carriage of Goods by Sea Act, 1925, and would be entitled to all the protection given there to a shipowner¹
- (e) A charterer by a demise would be entitled to the benefits conferred on an owner by Secs 502 and 503 of the Merchant Shipping Act, 1894

Bills of Lading :

When the master or the owner of a ship has agreed with separate shippers to convey goods to the place of her destination, the ship is called a *general ship*. The contract of affreightment

¹ Scrutton on Charterparties and Bills of Lading, 12th ed., p. 6.

² *Baumvoll v. Gilchrist & Co.* (1893) A.C. 8

³ See the cases discussed on this point in the Chapter on Sale of Goods

⁴ Art 1 (a) of the Schedule XX

as to each parcel of goods shipped in a general ship may be contained in a charterparty but is more usually evidenced by a document called a *bill of lading*¹. "A bill of lading is in every case a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship²." A bill of lading, unlike a charterparty, is not the contract but only an excellent evidence of the terms of the contract³.

The issue of Bill of Lading : to be the

The contract of affreightment ^{whether} ^{is an} case of a bill of lading is usually concluded before the bill of lading is issued. The contract is concluded and the bill of lading is issued in the following manner. The voyage is first advertised, usually by means of shipping cards. Then prospective shippers book different spaces on the ship for their goods by means of a *freight engagement notes*. In most cases there is a concluded agreement between a shipper and the owner as soon as the shipper books a space, the shipper being deemed to have agreed to ship his goods and the shipowner being regarded as having agreed to carry the same on the terms of his usual bill of lading⁴. The shipper then delivers his goods to those who are in charge of the ship and is given in exchange a *mate's receipt* signed by one of the ship's officers or the ship's agent which shows that the goods have been delivered to the ship. The shipper then usually preserves three forms of bills of lading appropriate to the transaction and fills them up with the necessary details. These forms along with the mate's receipt are then taken to the shipowner who signs them and returns one of the signed bills of lading to the shipper, retaining the other two signed bills of lading and the mate's receipt for himself.

Form of Bill of Lading : —>

"The usual form of bill of lading is the '*shipped*' bill of lading, so called because it usually commences with the words

¹ Scrutton on Charterparties and Bills of Lading, 12th ed. p. 2.

² Ibid, p. 9.

³ Per Lord Bramwell in *Sewell v. Burdick* (1884), 10 A. C. 105.

⁴ *Smith's Mercantile Law*, 13th ed., p. 362; *De Clermont vs. General S. N. Co.* (1891) 7 T. L. R. 187.

'*shipped in apparent good order and condition*' or words to the like effect, and acknowledges the actual receipt of the goods on board a named ship¹."

But there is another form of bill of lading which simply acknowledges that goods have been received by the shipowner for shipment and does not admit whether the goods have been put on board a ship or not. These bills of lading are known as '*received for shipment*' bill of lading. Where the bill of lading is issued in India, the carrier, whether the shipowner or the charter as the case may be, must under s. 7 of the Carriage of Goods by Sea Act, 1925, issue a 'shipped' bill of lading if the shipper so demands. But if the shipper has previously taken a "received for shipment" bill of lading or a similar document of title he must surrender it when he takes a 'shipped' bill of lading. The carrier may, however, at his option note the fact of shipment and the name or names of the ship or ships upon which the goods have been shipped on a bill of lading already issued instead of issuing a fresh "shipped" bill of lading, as provided on such noting the bill of lading already issued will be to the effect 'shipped' bill of lading.

It was usually the shipowner is his interest as to the condition of the goods. But it was held in *Manchester & London Dock Co. v. Wm. & Co.*² that a mere reference of a bill of lading, by inserting a clause like "all goods in good order and condition," does not fix the shipper with knowledge of condition, it will be expressly stated in the bill of lading of goods in good order and condition. It is annexed to the bill of lading of goods in good order and condition. It is annexed to the bill of lading of goods in good order and condition.

Requirements under the Carriage of Goods by Sea Act :

Under the carriage of Goods by Sea Act, 1925, a bill of lading including a similar document of title issued in respect of cargo shipped from an Indian port must contain the following —

- (a) It must contain a clause paramount, i.e., a statement

¹ Smith's Mercantile Law, 13th ed., p. 332.

² Article III, r. 3 (c) of the Schedule to the Carriage of Goods by Sea Act, 1925.

that it is to have effect subject to the rules laid down in the Act¹.

- (b) It must contain statements showing among others
- (i) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or in the cases of coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; (ii) the number of packages or pieces or the quantity or weight, as the case may be, as furnished in writing by the shipper; and (iii) the apparent order and condition of the goods; provided that no carrier, master or agent of the carrier, should be bound to state or show in the bill of lading any marks, number, quantity or weight which has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking²

Effects of a Bill of Lading are in charge of the ship and is given by the shipper. The effects of a bill of lading signed by one of the ship's officers are as follows —

1. A bill of lading is a receipt for the goods and shows that the goods have been delivered to the shipper. It is a document which is usually preserved in three forms: one for the shipper, one for the shipowner, and one for the consignee. The bill of lading is a document which is usually preserved in three forms: one for the shipper, one for the shipowner, and one for the consignee. The bill of lading is a document which is usually preserved in three forms: one for the shipper, one for the shipowner, and one for the consignee.

*Sandeman v. Sewer*³, A, the shipowner chartered a ship to C, the charterer, to sail to X, and load from C's agent there. The charterparty provided that the master should sign bills of lading without prejudice to the charter (i.e. without conflicting with any provision of the charter). At X goods were shipped by shippers who knew nothing of the charter, under a bill of lading signed by the master. It was held that the shippers could sue A

¹ Carriage of Goods by Sea Act, 1925, S. 4.

² *Ibid.*, r. 3, Art. III of the Schedule.

³ (1886), L.R. 2 Q.B. 86.

the master having signed as his agent. Similarly the shipowner will not be able to rely on any restriction on the authority of the master to sign a bill of lading in a particular form imposed under a charterparty which otherwise would be within the ordinary authority of the master unless the shipper knew of the terms of the charter¹.

2. Where a bill of lading is issued to a shipper, other than the charterer, who ships goods on a ship which is chartered by way of a demise, the charterer alone is liable for any loss or damage to the goods covered by the bill of lading whether the shipper knew of the charter or not².

3. Where a shipper has notice that the ship is chartered and that under the charter the master is the agent of the charterer in signing bills of lading, the shipper can sue the charterer only for any loss or damage even if the charter does not amount to a demise. In *Samuel v. West Hartlepool Steam Navigation Co.*³ a shipper shipped oil in a chartered ship under a bill of lading, the contract providing that the charterer's form of bill of lading was to be used. The bill of lading was in fact signed by the master on the charterer's form. It was held that the shipper could not sue the shipowner as his contract was with the charterer. But it was held in *Manchester Trust v. Furness, Wilby & Co.*⁴ that a mere reference of a charterparty in a bill of lading by inserting a clause like "all other conditions as per charter" does not fix the shipper with knowledge that the master was signing the bill of lading as the agent of the charter unless it is expressly stated in the bill of lading or a copy of the charter is annexed to the bill of lading⁵.

4. Where the charterer is himself the shipper, the bill of lading is to be regarded as merely a receipt for the goods and cannot vary the terms of the charter unless the parties expressly and clearly intend to effect such variation. As Lord Bramwell observed in *Wagstaff v. Anderson*⁶, "to say that the bill of lading is a contract, superseding, adding to, or varying the former con-

¹ *Scrutton on Charterparties and Bills of Lading*—12th Ed., 59.

² *Baumvoll vs. Gilchrest*, (1893) A.C. 8.

³ (1906), 11 Com. Cas. 115.

⁴ (1895) 2 Q.B. 539 (C.A.)

⁵ *The Draupner* (1910) A.C. 450.

⁶ (1880), 5 C.P.D. at p. 177.

tract, is a proposition to which I can never consent." If the holder of a bill of lading is an agent of the charterer the effect of the bill of lading would be the same¹. In *Rodocanachi v. Milburn*² the master of a chartered ship was authorised, under the charter, to "sign bills of lading, at any rate of freight, and as customary at port of lading, without prejudice to the stipulations of the charter." The charterer shipped goods under the charter and the master signed a bill of lading containing a stipulation that the shipowners would not be liable for "the negligence of the master and the crew" which was not in the charter. The goods were lost through the negligence of the master. It was held that the master could not insert a clause in the bill of lading to the prejudice of the charter and the bill of lading was merely a receipt and the shipowners were liable.

5. Where a bill of lading, issued to a charterer who is also the shipper, is transferred to a bonafide transferee for value without notice of the terms of the charterparty the shipowner cannot rely on the charterparty as against such transferee and is bound by the terms of the bill of lading. The position would be the same as against a shipper or an endorsee from him who takes a bill of lading in ignorance of the terms of a charterparty. In the *Patria*³ a ship was chartered to C under a charterparty which relieved the shipowner of liability for certain excepted perils including "restraint of princes." F shipped goods to G in ignorance of the charter and the master signed a bill of lading containing only an exception of "perils of the Sea". The goods were lost for "restraint of princes." In an action by G, who was also ignorant of the charter, against the shipowner, it was held that the shipowner was liable as the bill of lading did not contain an exception of "restraint of princes" and that the bill of lading was not affected by the terms of the charter of which both F and G were ignorant.

The effects of a bill of lading whether issued under a charterparty or not are as follows :—

1. A bill of lading signed by the master within the terms of his authority is *prima facie* evidence against the carrier (*i.e.*,

¹ *San Roman* (1872), L.R. 3 A. & E. 583, 592.

² (1886), 18 Q.B.D. 67.

³ (1871), L.R. 3 A. & E. 436.

the shipowner or the charterer, where the charter is a demise or the bill of lading is signed by the master as the agent of the charterer to the knowledge of the shipper) that the quantity or weight of the goods stated therein has been delivered on the ship¹. If the carrier cannot deliver the full quantity he will be liable for any deficiency unless he can prove that the quantity stated in the bill is incorrect.² Under the Carriage of Goods by Sea Act, 1925³, a bill of lading must show the number of packages or prices or the quantity or the weight and the apparent order and condition of the goods which are *prima facie* evidence against the carrier. The carrier will be liable for any deficiency in the weight or quantity or packages and the condition of the goods as stated unless he can show that the statement in the bill of lading relating to these was incorrect.

2. If a bill of lading is transferred to a bonafide transferee for value, the statements in the bill of lading are *conclusive* evidence against the carrier even if the goods have not in fact been shipped or the statements as to their quality, quantity or weight are incorrect and the carrier will be liable to the transferee for non-delivery or deficiency in the quality or quantity or weight of the goods as stated in the bill of lading⁴. But the carrier will not be liable even to a transferee for value if the bill was obtained by misrepresentation or fraud of the holder of the bill or the shipper or some person under whom the holder claims or if the holder knew at the time of the transfer of the bill to him that the statements in the bill were incorrect.⁵

3. In the case of a bill of lading issued in India, the shipper is deemed to guarantee the accuracy of the statements furnished by him e.g., as regards the quality or quantity of the goods and incorporated in a bill of lading and is bound to indemnify the carrier for any loss, damage or expenses arising from any inaccuracy in such statement e.g., when the carrier becomes liable to a bonafide transferee for value⁶.

4. Where any particular weight of a bulk cargo is accepted

¹ Carriage of Goods by Sea Act, 1925, r. 4 Art. III of the Schedule.

² *Smith vs. Bedouin S. N. Co.* (1896) A.C. 70.

³ R. 2, Art. III of the Schedule.

⁴ *Brown vs. Powell Coal Co.* (1875), L.R. 10 C.P. 562.

⁵ *Valeri vs. Boyland* (1866) L.R. 1 C.P. 382.

⁶ Carriage of Goods by Sea Act, 1925, r. 5, Art. III of the Schedule.

by a third party other than the carrier and is incorporated as such in a bill of lading issued in India, such weight as stated in the bill of lading will not be *prima facie* evidence against the carrier and the shipper will not also be deemed to guarantee the accuracy thereof and the carrier will not be liable for any deficiency in the weight even to a transferee of the bill of lading for value

Bill of Lading a document of title-functions :

A bill of lading has been defined as a document of title in the Sale of Goods Act¹. Its function is twofold, namely, (a) it serves as an evidence of the contract between the shipper and the carrier and (b) it serves as a symbol of the goods shipped. In the latter capacity it is regarded as a document of title in the sense that a transfer of the bill of lading is regarded as a symbolical transfer of such property in the goods in favour of the transferee as it was the intention of the parties to transfer². The transferor may intend (a) to transfer absolutely the property in the goods or (b) to pass the property conditionally as on the acceptance of bills of exchange for the price or (c) to effect a mortgage of the goods as security for an advance or (d) to effect a pledge of the goods for the same purpose or (e) to pass no property at all in the goods as when no consideration is paid for the transfer³.

The function of a bill of lading as a document of title is most ably summarised by Bowen L. J. in *Sanders v. Maclean*⁴ in the following words —

“A cargo at sea while at the hands of the carrier, is generally incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol; and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties, that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the

¹ S. 2 (4)

² *Sewell v. Burdick* (1884), 10 A.C. 74.

³ *Scrutton on Charterparties and Bills of Lading*, 12th Ed. pp. 190, 191

⁴ (1883), 11 Q.B.D. 327 at p. 341

indorsee to full possession thereof, the bill of lading, untill complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner.¹ It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

Transfer of Bill of Lading :

A bill of lading making goods deliverable "to order" or "to order or assigns" of the consignee or "to order" or "to order or assigns" of a blank name is by mercantile custom negotiable by indorsement and delivery and a bill of lading making goods deliverable to bearer is similarly negotiable by mere delivery.² But a bill of lading, which makes goods deliverable to a specified person and does not show on the face of it that it is transferable *eg.* where it does not show that the goods are deliverable to the "order or assigns" of the consignee or of a blank name, is not negotiable.³ Indorsement may be effected by the shipper on the consignee writing his name on the back of the bill. The indorsement may be "in full" or special *i.e.*, in favour of a specified person in which case the indorsee transfers it again only by reindorsing it.⁴ The indorsement may, however, be "in blank" in which case the bill of lading may be transferred again by mere delivery.⁵

Bills of Lading if Negotiable Instruments :

Although a bill of lading, which makes goods deliverable to order" or "to order or assigns" of a named person or a name left blank or "to bearer", is negotiable by indorsement and delivery or delivery only as the case may be, and property in the goods may pass if that was the intention of the parties to the transfer, yet such a bill of lading cannot be regarded as a negotiable instrument.

¹ Bills of Lading Act, 1855, S. 1.

² Scrutton on Charterparty and Bills of Lading, 12th Ed. p. 187.

³ *Henderson vs. Comptoir d'Escompte de Paris* (1873), 4 L. R. 5 p.c. 253 at 259.

⁴ *Lickbarrow vs. Mason* (1794), 5 T.R. 683.

⁵ Per Lord Selbourne in *Sewell vs. Burdick* (1884), 10 A.C. 74 at p. 83.

The characteristic feature of a negotiable instrument is that a holder in due course acquires a valid title to the instrument, even as against the true owner, irrespective of any defect in the title of his transferor in all cases excepting when he derives his title through a forged indorsement.¹ But the holder of a bill of lading takes the bill subject to any defect in the title of his transferor or any person from whom his transferor derives his title whether he is a holder for value without notice of such defects or not². The difference between a negotiable instrument and a bill of lading is, therefore, that in the former case a holder in due course takes a better title than his transferor, where in the latter case the holder takes only such title as his transferor possesses. Thus where A ships goods to C and sends the bill of lading to C along with a bill of exchange for the price on the condition that C can take the bill of lading on accepting the bill of exchange, the intention of the parties is that the property in the goods will only pass on C's acceptance of the bill of exchange.³ If C takes the bill of lading wrongfully without accepting the bill of exchange and indorses it in favour of D who takes it bonafide and for value, D will have no title to the goods as against A, though he was not aware of the defect in C's title. A bill of lading is, therefore, negotiable only in a popular sense and not in a technical sense⁴.

But in the following cases a bonafide transferee for value without notice acquires a better title than his transferor even in the case of a bill of lading :—

- (a) Where an unpaid vendor has parted with the property in the goods absolutely and has handed over the bill of lading to the consignee, a bonafide indorsee for value from the consignee of the bill of lading would take the goods free of the right of the vendor to stop the goods in transit.⁵
- (b) Where a bill of lading issued under a charterparty by the shipowner to the shipper whether the charterer or not, differs in its terms from the charter, the shipper,

¹ S. 58 of the Negotiable Instruments Act ; also see the chapter on Negotiable Instruments.

² *Curney vs. Behrend* (1854), 3 E. & B. at pp. 633, 634.

³ Sale of Goods Act, S. 25;

⁴ *Scrutton on Charterparties and Bills of Lading*, 12th ed. p. 189.

⁵ *Scrutton on Charterparties and Bills of Lading*, 12th ed. p. 210.

if he is the charterer or is aware of the charter; is bound by the terms of the charter. But if the bill of lading is transferred by the charterer or the shipper, who is aware of the charter, to a bonafide holder for value who takes it ignorant of the terms of the charter, such transferee will take the bill unaffected by the terms of the charter even though the agent of the shipowner who signed the bill of lading had no authority to sign it provided it was within the ordinary authority of the agent and the difference in the terms of the bill of lading was not obtained by fraud of any previous holder¹. Thus if any clause contained in the charterparty limiting the liability of the shipowner is not incorporated in the bill of lading, a bonafide indorsee for value of the bill of lading would take it free from the operation of such clause limiting the liability and can sue the shipowner for any loss or damage which is not excepted in the bill of lading, though it might have been so in the charterparty.²

- (c) Where a mercantile agent is, *with the consent of the owner*, in possession of the bill of lading in respect of the shipment of those goods, an indorsee or transferee for value of the bill of lading from him whether by way of sale, mortgage or pledge would acquire a valid title of the goods as against the true owner, provided the indorsee or transferee acts in good faith and has not noticed that the agent has no right to transfer the bill of lading.³
- (d) Where a person, having sold goods, continues in possession of the bill of lading in respect of the goods, a transfer of the bill of lading by him or his mercantile agent whether by sale, mortgage or pledge, would confer a valid title in respect of the goods to any transferee for value who takes the bill in good faith and without notice of the previous sale.⁴

¹ Mitchell *vs.* Soaife (1815), 4 Camp. 298.

² The Patria (1871) L.R. 3 A. & E. 436; Chappel *vs.* Comfort (1861), 10 C. B. N. S. 802; Manchester Trust *vs.* Furness (1895) 2 Q. B. 539; Turner *vs.* Haji Goolam (1904) A. C. 826.

³ Sale of Goods Act, S. 27; Contract Act, S. 178.

⁴ Sale of Goods Act, S. 30 (1);

- (e) Where a person, having bought or agreed to buy goods, obtains, *with the consent of the seller*, possession of the bill of lading in respect of the goods before he becomes the owner of the goods, as when a purchaser under a hire purchase agreement obtains the bill of lading before any instalment of the price has been paid, a transfer of the bill of lading whether by way of sale, mortgage or pledge would pass a valid title to the transferee as against the original seller provided the transferee takes the bill for value and in good faith and without notice of any lien or other right of the original seller¹

Warranties and Terms :

A contract of affreightment, whether contained in a charter party or evidenced by a bill of lading, contains statements, which are either of facts as then existing *e.g.* the then position or condition of the ship or are promises for the future *e.g.* that the ship will be ready to load by a given day. Statements as to promises for the future are usually to be found in a charterparty and are absent in a bill of lading, for a bill of lading is issued after the goods have been shipped or delivered for being shipped whereas the process of shipping and loading in the case of a charterparty takes place after the signing of the charterparty. The statements in a contract of affreightment are either warranties or terms. A warranty in a maritime contract is in a marine insurance contract denotes a term which is usually called a 'condition' and which is so essential to the contract that its non fulfilment entitles the party relying thereon to repudiate the contract. 'It is either an affirmation or promise of the existence of some fact or facts upon the non existence of which the contract ceases to exist'². A term, on the other hand, means any affirmation or promise which is not so vital as to make the contract dependent upon its truth. It corresponds to a warranty in an ordinary contract and its breach only gives rise to a right for damages to the aggrieved party. Whether a term in contract of affreightment is a warranty or a term is to be determined by the court from the intention of the parties to be gathered from all the surrounding circumstances.³ In *Sugar vs.*

¹ *Ibid*, S. 30 (2).

² *Commercial Laws of the World*, Vol. XIII, p 520

³ *Behu vs. Burness* (1863), 3 B. & 751

ber, or Charterers to have the option of cancelling the agreement. Duthie¹ a ship was chartered to be ready on or before 10th November. It was held that such readiness was a condition precedent or warranty, the breach of which would entitle the charterer to cancel the agreement. The same charter also contained a clause that the Captain should attend daily at the broker's office to sign bills of lading. It was held that such a daily attendance was only a term and not a warranty.

A party entitled to repudiate a contract of affreightment for breach of warranty may waive it and treat it as a mere term and sue for damages for its breach. In the case of a bill of lading disputes occur very rarely as to whether a term is a warranty or not because the shipper can hardly discover a breach of warranty before the ship has sailed and has no opportunity of taking his goods back and the shipper has to seek his remedy by way of damages in case of any breach of warranty.

Warranties may be either express or implied by law.

Implied Warranties :

The following warranties are implied in every contract of affreightment unless they are excluded by clear and unambiguous words² :—

- (1) *Warranty of Seaworthiness* :—A carrier by contracting to carry goods in a ship impliedly warrants that his ship is seaworthy for the purpose of the particular voyage,³ that is, she is fit in all respects to carry her cargo safely to its destination, having regard to all the ordinary perils to which such a cargo would be exposed on such a voyage.⁴ The seaworthiness must exist not only at the commencement of loading but also at the time of sailing from the port of loading.⁵

In *Cohen vs. Davidson*,⁶ a ship was chartered to proceed to a

¹ (1860) 8 C.B.N.S. 45.

² *Rathbone vs. McIver*, (1903) 2 K.B. 378 ; *Elderslie vs. Borthwick*, (1905) A. C. 93 ; *Nelson vs. Nelson*, (1908) A. C. 16 ; *Chartered Bank vs. B. I. S. N. Co.*, (1909) A. C. at p. 375.

³ *Steele vs. State Line Steamship Co.* (1877), 3 A.C. 72.

⁴ *Hedley vs. Pinkney S. S. Co.*, (1894) A.C. at p. 227 ; *Maori King vs. Hughes* (1895) 2 Q. B. 550.

⁵ *Scrutton on Charterparties*, 12th ed. p. 99.

⁶ (1877) 2 Q.B.D. 455.

a wharf in a river and there take on board a cargo and sail for another port. It was found that the ship was seaworthy when she began to load but unseaworthy when she put to sea. It was held that the shipowner was guilty of breach of warranty for sailing to make the ship seaworthy at the time she put to sea after loading.

There is no fixed standard for determining seaworthiness. Seaworthiness is a relative term and varies according to the nature of the voyage and the cargo to be carried. Thus a ship may be seaworthy for a voyage in home waters but unseaworthy for a voyage across the Atlantic¹ or for a voyage at one season of the year and not for a voyage at another season. Similarly a ship carrying wheat may be seaworthy without a refrigerating machinery or one which is out of order but a ship carrying frozen meat must have a refrigerating machinery in order before it sails in order to be seaworthy. Thus in *Maori King vs. Hughes*,² where frozen meat carried by a ship was damaged by a breakdown of the refrigerating machinery due to a defect which existed when the voyage started, it was held that the warranty of seaworthiness was broken and the shipper was entitled to recover damage from the shipowner, though the bill of lading provided that "the steamer shall not be accountable.... for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery". If, however, the defect due to which the machinery broke down arose after the voyage had started, the shipowner would not have been liable as the damage would have come under the exception. In this case the exception did not expressly limit the liability of the shipowner for unseaworthiness at the start and hence he was held liable. Similarly in *Stanton vs. Richardson*,³ it was held that the charterer was entitled to cancel the charterparty where it was found that the chartered ship was seaworthy to carry any cargo except wet sugar which was the cargo to be carried under the charterparty and for which the ship had not pumps of sufficient capacity.

Where a voyage is to be performed in different stages, during which the ship requires different kinds of, or further, preparation or equipment, there is an implied warranty that at the commence-

¹ *Smith's Mercantile Law*, 13th ed. p. 340.

² (1895) Q.B. 550.

³ (1875), L.R. 9 C.P. 390.

ment of each stage the ship is seaworthy in respect of her preparation or equipment for the purposes of that stage. Thus where a voyage includes a stay in a port of loading, sailing down a river to the open sea and then an open sea voyage, there are three stages in the voyage and at the commencement of each of the three stages she should be seaworthy for the purposes of that particular stage. Thus while sailing down the river, it will be enough for her to sail with a river crew and without the heavy equipment necessary for a sea voyage. But while taking to the sea she must have a seagoing crew and the heavy equipment necessary for a sea voyage in order to be seaworthy.¹

Where the undertaking as to seaworthiness is broken and the shipper discovers it before the voyage begins he can treat the contract as repudiated by the shipowner and refuse to load his goods. But if he discovers the breach subsequently he can recover any loss sustained by him by reason of the unseaworthiness. Under the common law a shipowner is absolutely liable for any loss caused by unseaworthiness at the starting of the voyage even where the unseaworthiness would not be discovered with all the care and diligence unless he is expressly protected from such liability by exceptions in the charter or the bill of lading.² But under the Carriage of Goods by Sea Act, 1925³ the undertaking of the shipowner is only to exercise due diligence to make the ship seaworthy where goods are shipped under a bill of lading whether under a charterparty or not. The shipowner is not, therefore, liable in cases of shipments under bills of lading issued in India for any unseaworthiness which could not be discovered by due diligence or care. But under the carriage of goods by Sea Act, 1925,³ the shipowner cannot, by any express provision in a bill of lading, relieve himself of his liability for any loss caused by his neglect or default in exercising due diligence to make the ship seaworthy which he is still permitted to do under the common law where goods are shipped under a charterparty.⁴

(2) *Implied warranty of reasonable despatch*:—In every contract of affreightment the carrier impliedly undertakes that the

¹ *Mcfadden vs. Blue Star Line* (1905) 1 K. B. 697; *Wade vs. Cockerline* (1905), 10 Com. Cas. 115; *Rid & Co., vs. Page, Son & East*, (1927) 1 K. B. 743;

² *Bank of Australia vs. Clan Line* (1916) 1 K. B. 39;

³ Art. II, r. 1.

⁴ Art. II, 48.

Audit :

The balance sheet, profit and loss account, Revenue Account and profit and loss appropriation account of every Indian Company or every insurer having his place of business or domicile in British India, in respect of all insurance business transacted by it or him, and of every non-Indian insurer, in respect of the insurance business transacted by him in India, must be audited annually by an auditor unless in the case of an Indian Company, it is already subject to audit under the Indian Companies Act, 1913. The auditor is to have the same rights and liabilities as provided for in S. 145 of the Indian Companies Act¹.

Actuarial Report and Abstract :

Every insurer carrying on life insurance business must, once at least in every five years, cause an investigation to be made by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations and requirements contained in Parts I and II of the Fourth Schedule to the Act. Such abstract must be accompanied by a certificate signed by the principal officer of the insurer that full and accurate particulars of every policy under which there is a liability, actual or contingent, have been furnished to the actuary for the purpose of investigation. The valuation report of the actuary must also specify the life insurance business in force at the date. The investigation and valuation must relate to the whole of the life insurance business in the case of Indian Companies or insurers having their principal place of business or domicile in India and to the life insurance business transacted in India in the case of insurers having their principal place of business or domicile outside India.²

Every abstract prepared by the actuary must contain a certificate by the actuary that he has satisfied himself as to the accuracy of the valuations made and must show the following amongst others :—

- (i) the valuation date ;

¹ Insurance Act, 1938, S. 12.

² Insurance Act, 1938, S. 13.

- (ii) the general principles and full details of the methods adopted in the valuation of each of the various classes of insurance including statements as to whether the principles were determined by the instruments constituting the company or by its regulations or bye laws or how otherwise, the method by which the net premiums have been arrived at and how the ages at entry, premium terms and maturity dates have been treated and so on
- (iii) the table of mortality used, and the rate of interest assumed in the valuation.
- (iv) the basis adopted in the distribution of profits as between the insurer and policy-holders.
- (v) the general principles adopted in the distribution of profits among policy-holders

Submission of Returns :

The audited account and statements in balance sheet, profit and loss account and revenue account and the actuarial report and abstract referred to above must be printed and five copies thereof must be furnished as returns to the Superintendent of Insurance within six months from the end of the period to which they refer. The period may be extended by the Superintendent of Insurance in the case of the furnishing of actuarial abstract and also in the case of insurers having their principal place of business or domicile outside British India or Indian insurers doing business outside India¹. Of the four copies so furnished one must be signed in the case of a company by the Chairman and two directors and by the principal officer of the company and, if the company has a managing director or managing agent, by that director or managing agent, and, in the case of a firm, by two partners of the firm, and, in the case of an insurer being an individual, by the insurer himself².

Where an insurance company incorporated in India furnishes its accounts and balance sheet to the Superintendent of Insurance in the manner referred to above, it need not file its balance sheet with the Registrar of Joint Stock Companies of the province under S 134 of the Indian Companies Act and it will be sufficient com-

¹ Insurance Act, 1938, S 15 (1)

² Insurance Act, 1938, S. 15 (2)

pliance with the Indian Companies Act if it sends to the Registrar a copy of the accounts and balance sheet furnished to the Superintendent of Insurance.

Every insurer must also submit to the Superintendent a certified copy of every report on the affairs of the concern which is submitted to the members or policy-holders and if it is a company incorporated in India, it must also submit to the Superintendent an abstract of the proceedings of every general meeting within thirty days from the holding of the meeting to which it relates¹.

Requirements of Returns for Foreign Companies :

Where a foreign insurer carrying on business in India is required by the law of the country in which he or it is constituted, incorporated or domiciled to prepare and to furnish to a public authority of that country documents of substantially the same nature as the balance sheet, profit and loss account, Revenue Account and actuarial report and abstract, such insurer is not required to prepare such accounts, statements and abstracts according to the Indian law and the provisions of the Act will be sufficiently complied with if such insurer furnishes to the Superintendent of Insurance four certified copies in the English Language of every balance sheet, account, abstract, report and statement supplied to the public authority of his or its own country according to its law within six months from the end of the period to which such documents refer together with the following statements, namely : —

- (a) a statement showing the assets held by the Insurer in India.
- (b) revenue account showing each class of business transacted by it in India.
- (c) an abstract of the valuation report in respect of all life insurance business transacted by the insurer in India.
- (d) A declaration in the prescribed form stating that all amounts received by the insurer have been shown in the revenue account except such sums as properly appertain to the capital account.

Custody and Inspection of Documents and Supply of Copies

Every return furnished to the Superintendent of Insurance or

¹ Ibid, Ss. 18 and 19.

² Ibid, S. 20 (2).

a certified copy thereof is to be kept by the Superintendent and to be kept open for inspection; and any person may procure a copy of any such return, or of any part thereof, on payment of a fee of six annas for every hundred words¹.

Every insurer must supply within fourteen days a printed or certified copy of the accounts, statements and abstract, furnished to the Superintendent under the Act, on the application of any share-holder or Policy-holder made at any time within two years from the date on which the document was so furnished, when the insurer is constituted, incorporated or domiciled in British India and in any other case within one month of such application².

Superintendent of Insurance, his powers and duties :

Superintendent of Insurance is the Officer, who is a qualified actuary, appointed by the Central Government to perform the duties of the Superintendent of Insurance under the Insurance Act, 1938;3. The control and supervision of insurance companies by the Central Government is exercised through the Superintendent of Insurance and the machinery of Control which the Act has provided for makes the Superintendent the most important figure in the whole scheme of the Act. In fact the shadow of the Superintendent looms over every sphere of insurance companies sought to be controlled and supervised by the Act. His powers and duties may be enumerated as follows :—

- (a) He grants the certificate of registration to an insurer. The application for registration is to be made to him and he sees whether the requirements of the Act have been satisfied before he grants the certificate. He has the power to cancel or withhold registration subject to his decisions being appealed against to the Court.
- (b) The certified copies, audited balance sheet, profit and loss account, revenue account and the actuarial report and abstract of every insurer is to be furnished to the Superintendent within a prescribed time. If it appears

¹ Insurance Act, 1938, S. 20 (1).

² Ibid, S. 20 (2).

³ Ibid, S. 2 (15).

to the Superintendent that any return so furnished is inaccurate or defective in any respect, he may¹

- (i) require from the insurer such further information, certified if he so directs by an auditor or actuary as he may consider necessary to correct or supplement such return ;
- (ii) Call upon the insurer to submit for his examination at the principal place of business of the insurer in British India any book of account, register or other document or to supply any statement which he may specify in a notice served on the insurer for the purpose ;
- (iii) examine any officer of the insurer on oath in relation to the return ;
- (iv) decline to accept any such return unless the deficiency has been supplied before the expiry of one month from the date on which the requisition for correcting the inaccuracy or supplying the deficiency was delivered to the insurer and on his declining to accept such return the insurer is to be deemed to have failed to comply with the provisions of the Act.

The decision of the Superintendent as regards declining to accept any return is subject to appeal to the Court².

- (c) If it appears to the Superintendent that an investigation and valuation of the business of an insurer by an actuary does not properly indicate the condition of the affairs of the insurer by reason of the faulty basis adopted in the valuation, he may, after giving notice to the insurer and giving him an opportunity to be heard, cause an investigation and valuation to be made at the expense of the insurer by an actuary appointed by the insurer for this purpose and approved by the Superintendent.

- (d) If the Superintendent has reason to believe that the interests of the policy-holders of an insurer are in danger

¹ Insurance Act, 1938, S. 21 (1).

² Ibid, S. 21 (2).

or that an insurer is unable to meet his obligations or has made default in complying with any of the provisions of the Act, or that an offence under the Act has been or is likely to be committed by an insurer or any of his officers or if he receives a requisition in this behalf signed by the shareholders of an insurance company not less in number than one tenth of the whole body of shareholders and holding not less than one tenth of the whole share capital or if he receives a requisition in this behalf signed by not less than fifty policyholders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than Rs. 50,000/- and supported by an affidavit, he may, after giving notice to the insurer and giving him an opportunity of being heard, appoint an auditor or actuary or both, not being an auditor or actuary in the employ of the insurer, to investigate the affairs of the insurer, or may himself make such investigation. The Superintendent may require the insurer to comply within a specified time with any directions he may issue to remedy the defects disclosed by such investigation. If the insurer fails to comply with such direction or if as a result of the investigation the Superintendent is of opinion that the business of the insurer should be wound up in the interests of the Policy-holders, the Superintendent may, after giving notice to the insurer and giving him an opportunity of being heard, apply to the court to have the business of the insurer wound up¹.

- (e) The Superintendent has the power to prosecute insurers or where the insurer is a company its directors or principal officers for non-compliance with the provisions of the Act².
- (f) The Superintendent may take such steps as he may consider necessary to inspect and verify that the assets of an insurer are invested as required by the Act.

Register of Policies and Claims :

An insurer who has his principal place of business or domicile

¹ Insurance Act, S. 33 (1), (4) and (5).

² Ibid, S. 107.

in British India or a company incorporated in India must, in respect of all insurance business, and an insurer incorporated or constituted outside British India must, in respect of the insurance business transacted by him in India, maintain (a) a register of policies and (b) a register of claims¹. In a register or record of policies must be entered in respect of every policy issued by the insurer, the name and address of the Policy holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice. In a register or record of claims must be entered every claim made together with the date of the claim, the name and address of the claimant and the date on which the claim was discharged, or in the case of a claim which is rejected, the date of rejection and the grounds therefor².

Investments :

Every insurer incorporated in or domiciled in India or the United Kingdom must invest and hold invested assets to the extent of fifty-five per cent of the sum of his total liabilities to the holders of life insurance policies in India, representing matured claims and claims to mature, less the amount deposited by it with the Reserve Bank of India in accordance with the provisions of the Act and the amount lent by him to policy holders on policies of life insurance, in the following manner³ :

- (a) Twenty five per cent of such total liabilities in Government Securities, and
- (b) Thirty per cent of such total liabilities in Government securities or other approved securities or securities of or guaranteed by the Government of the United Kingdom.

But an insurer incorporated or domiciled elsewhere than in British India or the United Kingdom and an insurer incorporated in British India whose share capital to the extent of one-third is owned by, or the members of whose governing body to the extent of one-third consists of, individuals domiciled elsewhere than in British India or the United Kingdom, must invest and hold invested assets to the whole extent of the sum of his total liabilities to

¹ Ibid, S 14

² Ibid, S 14

³ Ibid, S 14

⁴ Insurance Act 1938, S 27 (1)

holders of life insurance policies in India on account of matured claims and claims to mature less the amount of his deposit and any amount due to him on loans granted by him on policies of life insurance, in the following manner¹ —

- (a) Thirty three and one third per cent of such total liabilities in Government securities, and
- (b) the balance of such total liabilities in Government securities or other approved securities or securities of or guaranteed by the Government of the United Kingdom

Every insurer carrying on business at the commencement of the Act must invest his assets in the above manner within four years from the commencement of the Act—

Every insurer other than provident society registered under the Act and carrying on the business of life insurance, is required, twice in every year, namely within fourteen days of the 30th of June and 31st of December respectively to submit to the Superintendent of Insurance a statement² certified by the principal officer of the insurer showing as at the said dates the assets held invested in accordance with the above provisions. The Superintendent may at any time take proper steps to verify and inspect the assets invested in the manner required by the Act and the insurer must comply with all requisitions made by the Superintendent in that behalf³

Prohibition of Loans :

No insurer can grant loans or temporary advances to (1) any director, managing agent, manager, auditor, actuary or officer of the insurer where the insurer is a company or (b) to any partner of the insurer where the insurer is in partnership or (c) to any other company or firm, excepting a banking concern in which any such director, manager, managing agent, actuary, officer or partner holds the positions of a director, manager, managing agent, actuary, officer or partner, either on hypothecation of property or on personal security or otherwise excepting where the loan or advance is given on life policies issued by the insurer to the extent of the

¹ Ibid, S 27 (2)

² Insurance Act, S 27 (3)

³ Insurance Act, S 28 (1)

⁴ Ibid, S 28 (2)

surrender value of such policies¹. In the case of loans to such specified persons as in (a) and (b) existing at the commencement of the Act, such loans must have been repaid within one year from the commencement of the Act and in case of default such defaulting director, manager, managing agent, auditor, actuary, officer or partner shall cease to hold office on the expiry of such one year.

Limitation 'on Employment of Managing Agents :

The Insurance Act, 1938, prohibits the appointment of a managing agent for the conduct of the business of an insurer.² If an insurer is a company which was engaged in the business of insurance before the commencement of the Act and employed a managing agent for the conduct of its business, then such managing agent shall cease to hold office on the expiry of three years from the commencement of the Act, notwithstanding anything contained in the Indian Companies Act, 1913, or in the memorandum and articles of the insurer or in the agreement with the managing agent, and such managing agent shall not be entitled to claim any compensation from the insurer for the premature termination of his employment³. The insurer must not pay and such managing agent must not accept as remuneration more than Rs. 2000/- per month in all, including all salary, commission and other remuneration payable to the managing agent, during the three years after the commencement of the Act during which the managing agent will be able to function⁴.

Amalgamation and Transfer of Insurance Business :

No life insurance business excepting an insurer constituted, domiciled or incorporated outside British India, can be transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared and sanctioned by the Court having jurisdiction over one or other of the insurers concerned in the following manner⁵.

- (a) The scheme must set out the agreement under which the transfer or amalgamation is proposed to be effected.

¹ Insurance Act, 1938, S. 29.

² Insurance Act, 1938, S. 32 (1).

³ Ibid, S. 32 (2).

⁴ Insurance Act, 1938, S. 32 (3).

⁵ Ibid, S. 35 (1).

and shall contain such further provisions as may be necessary for giving effect to the scheme.

- (b) After the scheme is prepared and before any application may be made to the Court for its sanction, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reasons therefor must, at least two months before the application is made, be sent to the Central Government together with certified copies of the following documents:—

- (i) a draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer;
- (ii) Statements of the assets and liabilities of the insurers concerned in such amalgamation or transfer; and
- (iii) the actuarial or other reports on which the scheme was founded including a report by an independent actuary on the proposed amalgamation or transfer.

These documents are to be kept open for inspection of the members and policy-holders at the principal and branch offices and Chief agencies of the insurers concerned during the two months before the application is made.

- (c) After the expiry of two months the application may be made to any of two courts mentioned above. The Court, if it so directs, shall cause notice of the application to be sent to every holder of a life policy of the insurers concerned and a statement of the nature of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as it may direct and after hearing the directors and such Policy-holders or other persons as may apply or are entitled to be heard, may sanction the arrangement, if it is satisfied that no sufficient objection to the arrangement has been established¹.

Statements required after amalgamation or transfer :

In the case of every amalgamation or transfer whether in accordance with the provisions of the Act which applies to Indian insurers only or otherwise, the insurer carrying on the amalgama-

¹ Ibid, S. 36.

ted business or to whom the business has been transferred must, within three months from the completion of the amalgamation or transfer, furnish to the Central Government ¹

- (a) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and
- (b) a declaration signed by every insurer concerned or in the case of a company by the Chairman or the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is fully set forth in the declaration, and
- (c) where the amalgamation or transfer has not been made in accordance with a scheme confirmed by the Court e.g. where the amalgamation or transfer is between non Indian insurers
 - (i) certified copies of statements of the assets and liabilities of the insurers concerned and
 - (ii) certified copies of the actuarial or other reports on which the agreement or deed was founded

Assignment or transfer of Policies :

We have dealt with this subject already under Life Insurance

Nomination by Policy-holder :

The holder of a policy may at the time of effecting the policy or at any time before the policy matures for payment, nominate a person or persons to whom the money secured by the policy shall be paid in the event of his death. Such nomination to be valid must be either incorporated in the text of the policy itself or be made by an endorsement on the policy, communicated to the insurer and registered by him in the records relating to the policy. The insurer may charge a fee not exceeding Re 1/- for registering any such endorsement. But any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or further endorsement or a will as the case may be and ceases to have effect automatically on an assignment or transfer of the Policy. The nominee has no claim

¹ Insurance Act, 1938, S 37

to the money payable under the Policy if the policy-holder is alive when the policy matures for payment. If the nominee is not alive at the time of the death of the policy-holder, the heirs or legal representative of the policy-holder and not of the nominee becomes entitled to the insurance money¹.

Licensing of Insurance Agents :

Any person not suffering from the disqualifications mentioned below may obtain a license to act as an insurance agent for the purpose of soliciting or procuring insurance business from the Superintendent of Insurance or an officer authorised by him in this behalf on payment of a fee not exceeding Re. 1/-.² A license issued under the provisions of the Act entitles the holder to act as an insurance agent for any registered insurer³. Any individual acting as an insurance agent without holding a license is punishable with fine extending to Rs. 50/- and any insurer or any one acting on behalf of such insurer who appoints as an insurance agent any individual not so licensed, or transacts any insurance business through any such individual, is punishable with fine extending to Rs. 100/-⁴. The disqualifications referred to above are as follows :⁵

- (a) that the person is a minor ;
- (b) that he is found to be of unsound mind by a competent Court ;
- (c) that he has been found by a competent court guilty of criminal misappropriation or criminal breach of trust or cheating ;
- (d) that in the course of any judicial proceeding relating to any policy or the winding up of an insurance company or in the course of an investigation of the affairs of an insurer it has been found that he is guilty of or has knowingly participated in or connived at any fraud, dishonesty or misrepresentation against an insurer or an assured.

A license issued under the Act expires on 31st March every

¹ Insurance Act, 1938. S. 39 (1), (2), (3), (4), (5) & (6).

² Ibid, S. 42 (1).

³ Ibid, S. 42 (2).

⁴ Ibid, S. 43 (2).

⁵ Ibid, S. 42 (4).

year and must be renewed from year to year on payment of a fee of Re 1/- unless the holder is in the meantime disqualified¹. If after the grant of a license it is found that the holder suffers from any of the disqualifications mentioned above the Superintendent of Insurance must cancel the license. Where an agent knowingly contravenes any provision of the Act the Superintendent may cancel his license.

Register of Insurance Agents :

Every insurer and every person who acting on behalf of an insurer employs licensed insurance agents shall maintain a register showing the name and address of every licensed insurance agent appointed by him and the date on which his appointment began and the date, if any, on which his appointment ceased.

Commission :

No person can pay or contract to pay after six months from the commencement of the Act, any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person who is not a licensed agent². The remuneration for licensed agents has been laid down as follows³:

- (a) no insurer can pay or contract to pay any licensed agent as commission or remuneration an amount exceeding in the case of life Insurance business, forty per cent of the first year's premium payable on any policy or policies effected through him and five per cent of a renewal premium, or, in the case of business of any other class fifteen per cent of the premium
- (b) But insurers in respect of life insurance business only, may pay during the first ten years of their business to their insurance agents fifty five per cent of the first year's premium payable on any policy or policies effected through them and six per cent of the renewal premiums
- (c) No insurer can forfeit or stop payment of renewal

¹ Insurance Act, 1938 S 42 (3)

² Ibid S 42 (5)

³ Ibid, S 43 (1)

⁴ Ibid S 40 (1)

⁵ Ibid S 40 (2)

commission due to an agent whose employment may have terminated under any agreement by reason only of such termination provided the agent has served him continually and exclusively for ten years and does not work for any other insurer¹.

Rebates :

No person is permitted to allow or offer to allow to any other person, as any inducement to effect or renew a policy, any rebate of the whole or part of the commission payable or any rebate of the premium shown in the policy except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer, nor is any person taking out or renewing a policy allowed to accept such a rebate. A person offering or allowing such rebate is punishable with fine which may extend to Rs. 100/- and any person accepting such an offer or rebate is punishable with fine which may extend to Rs. 50/-².

Special Provisions for Policy-holders :

Avoidance of the Policy :

An insurer cannot question or avoid a policy, if effected prior to the commencement of the Act, after the expiry of two years from such commencement and, if effected after the commencement of the Act, after the expiry of two years from the date on which it was effected, on the ground of any inaccurate or false statement made in the proposal, or in any report of a medical officer or referee or friend of the insured, or in any other document leading to the issue of the policy unless the insurer can show that such statement was on a material matter and deliberately and fraudulently made by policy-holder knowing it to be false,³

Application of British Indian Law :

The holder of a policy issued by a non-Indian insurer in respect of business transacted in British India has, after the commencement of the act, the right to receive payment of the money secured by the policy in British India, notwithstanding any agree-

¹ Insurance Act, 1938, S. 44.

² Ibid, S. 41 (1) & (2).

³ Ibid, S. 45.

ment to the contrary, and to sue for relief in respect of the policy in any competent Court in British India and in any such suit the law of British India would be applicable¹.

Payment of money into court :

Where due to conflicting claims in respect of a policy which has matured for payment of insufficiency of proof of title to the amount secured thereby or for any other reason the insurer is unable to ascertain who amongst the claimants has the real title and can give a valid discharge to the insurer, the insurer must, before the expiry of nine months from the date of the maturity of the policy and in the case of death of the assured after six months from such death, apply to the court, within whose jurisdiction the place at which the payment is to be made is situate, to pay the money into court. The application for permission to pay into court must be made by a petition verified by an affidavit signed by a principal officer of the insurer setting forth the following particulars, namely :—

- (a) the name of the insured person and his address ;
- (b) if the insured is deceased, the date and place of his death ;
- (c) the nature of the policy and the amount secured by it ;
- (d) the name and address of each claimant so far as is known to the insurer with details of every notice of claim received ;
- (e) the address at which the insurer may be served with notice of any proceeding relating to disposal of the amount paid into court.

If, on such application, it appears to the Court that a satisfactory discharge for the payment of the amount cannot otherwise be obtained by the insurer it must allow the money to be paid into Court and invest the amount in Government securities pending its disposal. On the money being paid the Court will give notice of the same to every ascertained claimant. If any claimant applies to withdraw the money the Court must cause notice of the same to be given to every other ascertained claimant at the cost of the claimant so applying and on such notice being

¹ Insurance Act, 1938, S. 46.

given the Court adjudicates on the rival claims and disposes of the amount accordingly¹.

Directions of Insurance Companies :

Where the insurer is a company incorporated under the Indian companies Act, 1913, and carries on the business of life insurance, not less than one fourth of the whole number of the directors of the company must be elected by the holders of policies of life insurance from amongst holders of policies of life insurance having the qualifications prescribed by the articles of the company².

Restrictions on Dividends and Bonuses :

No insurer constituted, incorporated or domiciled in British India carrying on the business of life insurance shall in respect of such life insurance business declare or pay any dividend to shareholders or any bonus to policy-holders except out of a surplus ascertained as the result of an actuarial valuation of the assets and liabilities of the insurer³.

Prohibition of business on dividing principle :

No insurer shall after the commencement of the Act begin or in the case of existing companies continue to carry on after three years from that date, any business upon the dividing principle, that is to say, on the principle that the sum secured by the policy is not fixed but depends either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits. This, of course, does not prevent an insurer from declaring and paying variable amounts as bonuses in addition to the sum secured by the policy based on a periodical actuarial valuation. During the three years after the commencement of the Act when an existing insurer may continue business on dividing principle the insurer must withhold from distribution a sum not less than forty per cent of the premiums received during each year after the commencement of the Act and invest the same so as to make up the amount required for investment under the Act⁴.

¹ Insurance Act, 1937, S. 47.

² Ibid, S. 48.

³ Ibid, S. 49.

⁴ Insurance Act, 1938, S. 52.

Notice of Options :

When a policy lapses the insurer must, within three months of the lapsing, give notice to the policy holder informing him of the options available to him¹

Supply of Copies of Proposals and Medical Reports :

Every insurer must, on application by a policy holder and on payment of a fee not exceeding one rupee, supply to the policyholder certified copies of the questions put to him and his answers thereto contained in his proposal for insurance and in the medical report supplied in connection therewith

Surrender Value :

This subject has already been dealt with

Special Provisions relating to external companies :

If any special requirement as to keeping of deposits or assets is imposed on Indian Companies by any country as a condition of carrying on insurance business in that country and no such requirement is imposed on insurers constituted, incorporated or domiciled in such other country under the Act, then the Central Government if satisfied of the existence of such discriminating requirements on Indian Companies in such other country, by notification in the Official gazette, direct the same or similar requirements to be imposed upon insurers of such other country as a condition of carrying on the business of insurance in British India

Every insurer having his principal place of business or domicile outside British India, who establishes a place of business within British India or appoints a representative in British India with the object of obtaining insurance business, must, within three months from the establishment of such place of business or the appointment of such agent, file with the Superintendent of Insurance, the following particulars —

(a) a certified copy of the Charter, statutes, deeds of settle

¹ Ibid, S. 50.

² Ibid, S. 51

³ Ibid, S. 62

- ment, or memorandum and articles or other instrument constituting or defining the constitution of the insurer, and, if the instrument is not in the English language, a certified translation thereof ;
- (b) a list of the directors, if the insurer is a company ;
 - (c) the name and address of some one or more persons resident in British India authorised to accept on behalf of the insurer service of process and any notice required to be served on the insurer, together with a copy of the power of attorney granted to him ,
 - (d) the full address of the principal office of the insurer in British India ,
 - (e) a statement of the classes of insurance business to be carried on by the insurer ; and
 - (f) a statement verified by an affidavit setting forth the special requirements, if any, to which Indian Companies are subject as a condition of carrying on insurance business in his country

If there is any alteration in any of the above particulars at any time the insurer must furnish to the Superintendent of Insurance particulars of such alteration forthwith

Every insurer having his principal place of business or domicile outside British India must keep at his principal office in British India such books of account, registers and documents as will enable the accounts, statements, and abstracts which he is required under the Act to furnish to the Superintendent of Insurance, in respect of the insurance business transacted by him in India, to be completed and, if necessary, checked by the Superintendent

Winding up :

The Court may order the winding up of an insurance company on all the grounds set out in Ss. 161 and 163 of the Indian Companies Act. In addition to these grounds the Court may order the winding up of an insurance company under the Act on the following grounds¹—

- (a) If with the sanction of the Court previously obtained a petition is presented by not less than one tenth of

¹ Insurance Act, 1938, S. 53.

all the shareholders holding not less than one tenth of the whole share capital or by not less than fifty policy-holders holding policies which have been in force for not less than three years and are of the total value of not less than Rs. 50,000/-; or

- (b) If the Superintendent of Insurance, who is authorised to do so, applies in this behalf to the Court on any of the following grounds, namely—
- (i) that the company has failed to deposit or to keep deposited with the Reserve Bank the amounts required by S. 7, or S. 98 of the Insurance Act ;
 - (ii) that the company has failed to comply with any requirement of the Insurance Act and has continued such failure for a period of three months after notice of such failure has been conveyed to the company by the Superintendent of Insurance ;
 - (iii) that it appears from the returns furnished under the provisions of the Act or from the results of any investigation made thereunder that the company is insolvent ; or
 - (iv) that the continuance of the company is prejudicial to the interests of the policy-holders.

An insurance company cannot be wound up voluntarily except for the purpose of effecting an amalgamation or a reconstruction of the company, or on the ground that by reason of its liabilities it cannot continue its business¹

Winding up of Secondary Companies :

When the insurance business or any part thereof of an insurance company is transferred to another insurance company under any arrangement the transferor company is known as the "Secondary Company" and the transferee company is known as the "principal company". If the principal company is being wound up by or under the supervision of the Court, the Court must also order the secondary company to be wound up in conjunction with the principal company and may appoint the same person to be the liquidator for the two companies and may make provision for such other matters as may be necessary in view of the companies

¹ The Insurance Act, 1938, S. 54.

being wound up as if they were one company. An application may also be made in relation to the winding up of the secondary company in conjunction with the principal company by any creditor of, or person interested in, the principal or the secondary company. Unless otherwise ordered the winding up of the secondary company will commence at the same time as that of the principal company. Before ordering the winding up of the secondary company the Court must hear all objections relating thereto where the winding up of the secondary company does not commence at the same time as that of the principal company.¹

In adjusting the rights and liabilities of the members of principal and secondary companies among themselves the Court must have regard to the constitution of the companies, in pursuance of which the transfer had taken place, in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company or as near thereto as possible. Where a company stands in the relation of a principal company to one insurance company and in the relation of a secondary company to some other insurance company or where there are several insurance companies standing in the relation of secondary companies to one principal company, the Court may deal with any number of such companies together or in separate groups as it thinks most expedient upon the principles stated above.²

Valuation of Liabilities :

In the winding of an insurance company or in the insolvency of any other insurer, the value of the assets and the liabilities of the insurer must be ascertained in such manner as the liquidator or receiver in insolvency thinks fit subject to any directions which the Court may give and in the case of current contracts in respect of life insurance business, according to the method and basis, to be determined by an actuary approved by the Court³.

Application of Surplus Assets of Life Insurance Fund :

In the winding up of an insurance company and in the

¹ Insurance Act, 1938, S. 57 (1). (2). (4) & (5).

² Ibid, S. 57 (3) & (6).

³ Insurance Act, 1938, S. 55 (1).

insolvency of any other insurer the value of the assets and liabilities of the insurer in respect of life insurance business must be ascertained separately from the value of any other assets or any other liabilities of the insurer and no such assets can be applied to the discharge of any liabilities other than those in respect of life insurance business except when there is a surplus of assets over liabilities in respect of life insurance business. In ascertaining the amount of surplus, in case there is such a surplus, addition to liabilities is to be made where any portion of the profits on the whole business had been allocated by the insurer to policy-holders in respect of life insurance business. The addition is to be of an amount which is of the same proportion of the surplus without such addition as the profits allocated bear to the profits allocated to the policy-holders during the ten years immediately preceding the winding up or insolvency. The following example will make it clear:—In winding up the assets of company "A" in respect of life insurance business exceed liabilities by Rs. 10,000/-, Rs. 20,000/- being assets and Rs. 10,000/- being liabilities. But before the winding up, company "A" allocated Rs. 1000/-, being portion of the profits to life policy-holders. During ten years preceding the winding up Rs. 10,000/- was allocated to life-policy-holders out of the profits. Therefore the surplus of assets in respect of life insurance business will not be Rs. 10,000/- but (Rs. 20,000/- - (Rs. 10,000+1000)) =Rs. 9000/-. The sum of Rs. 1000/- which is added to liabilities is $\frac{1}{10}$ of Rs. 10,000/- (being the surplus without such addition) which is of the same proportion as the sum allocated for profits i.e., Rs. 1000/- bears to the total sums of profits allocated during the preceding ten years i.e., Rs. 10,000/-. But the Court may vary the proportion of the sum to be added if it thinks that the above formula is inequitable in the circumstances or that there has been no allocation of profits.¹

Reduction of Contracts of Insurance :

In the case of liquidation of an insurance company or the insolvency of an insurer the Court may reduce the amount of insurance contracts of all classes of the company or the insurer upon such terms and subject to such conditions as the Court thinks

¹ Insurance Act, 1936, S. 56 (1) & (2).

just. But where, prior to winding up, a company carrying on the business of life insurance has been proved to be insolvent, the Court may, if it thinks fit, reduce the amount of insurance contracts upon such terms and subject to such conditions as the Court thinks fit instead of making a winding up order. Orders as above can be made only on an application to be made either by the liquidator or by or on behalf of the company, or by a policy-holder or by the Superintendent of Insurance.¹ For the purpose of any such reduction of contracts the value of the assets and liabilities of the company and all claims in respect of policies issued by it must be ascertained according to the directions of the Court if any and subject to the rule that the liabilities on all current contracts effected in the course of life insurance business including annuity business is to be calculated by the method and upon the basis to be determined by an actuary approved by the Court.²

Partial winding up :

If at any time it appears expedient that the affairs of an insurance company (not any other insurer) in respect of any class of business comprised in the undertaking of the company should be wound up but that any other class of business comprised in the undertaking should continue to be carried on by the company or be transferred to another insurer, a scheme for such purpose may be prepared and submitted to the Court and, on its being sanctioned by the court, it will become effective. But any such scheme must provide for the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets which may arise in relation to the part of the business wound up) and also for the future rights of the different classes of policy-holders and the manner for winding up the part of the business proposed to be wound up. In calculating the assets and liabilities and the allocation thereof for this purpose the same rules as to valuation as referred to above should be adhered to.³

¹ Ibid, S. 61 (1), (2) & (3).

² Ibid, S. 55 (2) & 6th Schedule.

³ Insurance Act, 1938, S. 58.

Provident Societies :

Definition :—

Provident society means a person, or partnership or a company which receives premiums or contributions for securing annuities on human life not exceeding Rs 50/- or for a fixed sum, not exceeding Rs 500/ exclusive of any profits or bonus, to be paid on the happening of any of the following contingencies¹ —

- (a) the birth, marriage or death of any person or the survival by a person of a stated age or contingency
- (b) failure of issue ,
- (c) the occurrence of a social, religious or other ceremonial occasion
- (d) disablement in consequence of sickness or accident ,
- (e) the necessity of providing for the education of a dependent , and
- (f) any other contingency which may be prescribed or authorised by the Provincial Government with the approval of the Central Government

Name :

A provident society if started after the commencement of the Act must adopt and, if started before such commencement, must continue to use after six months of such commencement as its name words which include the word 'provident' and exclude the word 'life'

Insurable Interest :

No provident society can issue a policy whereby the money secured by it is payable to any person other than the person paying the premium thereon or the wife, husband, child, grand child, parent, brother or sister, nephew or niece of such person. In other words a person is deemed to have an insurable interest in the lives of these relations only for the purpose of provident insurance²

Dividing Business :

No provident society like an insurer can carry on business on

¹ Ibid, Ss 65 & 66

² Insurance Act, 1938, S 67

³ Insurance Act, 1938, S 58.

the dividing principle¹. But where a society had been doing business on the dividing principle at the commencement of the Act, the Superintendent may allow the society to continue the old business on dividing principle for a period not exceeding two years with a view to reorganising its business on new lines prescribed by the Act provided the society applies within three months from the commencement of the Act for permission to do so and does not enter into any new business on the dividing principle after the commencement of the Act. If a society carries on business on the dividing principle excepting as aforesaid the Superintendent of Insurance is under a duty to take steps, as soon as possible, to have the society wound up -

Registration :

No provident society except one registered under the Provident Insurance Societies Act, 1912, can receive any premium or contribution until it has obtained from the Superintendent of Insurance a certificate of registration². Every application for registration must be accompanied by the following³ :

- (a) A certified copy of the Memorandum and Articles of Association in case the society is a company or a certified copy of the deed of constitution of the society in case it is not a company and in every case a certified copy of the rules of the society ;
- (b) the names and addresses of the proprietors or directors, and the managers of the society ;
- (c) certificate from the Reserve Bank of India that the deposit required under the Act is mentioned below has been made ; and
- (d) a declaration verified by an affidavit that the minimum working capital required under the Act is available.

If the superintendent is satisfied that all the requirements of the Act have been complied with, he will register the society and its rules and issue a certificate of registration and he may refuse to issue such a certificate until he is so satisfied⁴.

¹ See *ante* for the meaning of dividing principle

² *Ibid*, S. 69.

³ *Ibid*, S. 70 (1)

⁴ *Ibid*, S. 90 (2).

⁵ Insurance Act, 1938 S. 70 (3).

Cancellation of Registration :

The Superintendent of Insurance may cancel the registration of a society if he obtains the sanction of the Court to do so after giving previous notice in writing to the society specifying the grounds for the proposed cancellation and allowing the society an opportunity of being heard. The grounds on which the Superintendent may apply for and effect cancellation of registration of a society are the following¹ :—

- (a) If he is satisfied as the result of an enquiry made by him under s. 87 of the Act—
 - (i) that the society is insolvent or is likely to become so, or
 - (ii) that the business of the society is conducted fraudulently or not in accordance with the rules thereof, or that it is in the interests of the policy-holders that the society should cease to carry on business.
- (b) If the deposits required under the Act have not been made : or
- (c) If the society, having failed to comply with any requirements of the Act, has continued such failure for a period of one month after notice of such failure has been conveyed to the society by the Superintendent of Insurance.

But where the society is insolvent or likely to become so as under clause (a) (i) above, the Superintendent may, instead of applying for cancellation of registration, make a recommendation to the court that the contracts of the society should be reduced in such manner and subject to such conditions as he may indicate

Working Capital :

Every provident society established after the commencement of the Act, must have a paid up capital sufficient to provide as working capital a net sum of not less than Rs. 5000/- exclusive of deposits made under the Act and in the case of a company exclusive of any expenses incurred in connection with the formation of the company. Otherwise the society will not be registered.²

¹ Ibid, S. 70 (4)

² Insurance Act, 1938, S. 72.

Deposits :

Every provident society must, if established before the commencement of the Act within one year from such commencement, or, if established after the commencement of the Act before the society applies for registration, deposit and keep deposited with one of the offices of the Reserve Bank of India, for and on behalf of the Central Government, cash or approved securities amounting at the market value of the securities on the date of the deposit to Rs. 5000/- and must thereafter make each year a further deposit amounting to not less than one fifth of the gross premium income for the year until the total amount so deposited and kept come upto Rs. 50,000/-¹

Rules :—

Every provident society established after the commencement of the Act must set forth in its rules the following² :—

- (a) the name, the object and the location of the registered office of the society;
- (b) the contingencies or the classes of contingency on the happening of which money is to be paid;
- (c) the conditions to be complied with before, and the payments to be made on, admission to the society;
- (d) the rates of premium or contribution, and the periods for which or the times at which premiums or contributions are payable ;
- (e) the maximum amount payable to a subscriber or policy-holder ;
- (f) the nature and amounts of the benefits provided for by the society ;
- (g) the circumstances in which any bonus may be paid to a policy-holder ;
- (h) the nature of the evidence required for the proof of the happening of any contingency on which money is to be paid ;
- (i) the circumstances in which policies may be forfeited or renewed or the whole or a part of the premiums paid on

¹ Ibid, S. 73.

² Ibid, S. 74 (1).

a policy may be renewed, or a surrender value of a policy may be granted ;

- (j) the penalties for delay in paying or failure to pay premiums or contributions ;
- (k) the proportion of the annual income of the society which may be disbursed on and the provisions to be made for meeting the expenses of the management of the society ;
- (l) the person or persons who or the authority which shall have power to invest the funds of the society ;
- (m) the provisions for appointment of auditors and their remuneration ;
- (n) the procedure to be adopted in altering the rules of the society ;
- (o) the following unless these are provided for in the article of association of a society which is a company incorporated under the Indian Companies Act, 1913
 - (i) the mode of appointment and removal; the qualification and the powers of a director, manager, secretary or other officer of the society ,
 - (ii) the manner of raising additional capital
 - (iii) the provisions for the holding of general meetings of the members and policy holders and for the powers to be exercised and the procedure to be followed thereat and
- (p) Such other matters as may be prescribed

Where the rules of any provident society registered under the Provident Insurance Societies Act, 1912, do not contain the particulars mentioned above, the society must, before the expiry of one year from the commencement of the Act, amend the rules so as to comply with the above requirements.

Amendment of Rules :

No amendment of any rule of a provident society is valid until it has been sent to and duly registered by the Superintendent of Insurance. The Superintendent will register the amendment if he is satisfied that the proposed amendment is neither contrary to the provisions of the Act nor does it unfairly affect the rights of existing members or policy-holders of the society.¹

¹ Insurance Act, 1938, S 75.

Register of Books :

Every provident society must keep at its registered office¹—

- (a) a register of members in which will be entered the name, address and occupation, if any, of every proprietor, director, manager or secretary and of every member of the society ;
- (b) a register or record of policies in which must be entered, in respect of every policy issued by the society, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the society has notice ;
- (c) a register of claims in which must be entered every claim made, together with the date of the claim, the name and address of the claimant and the date on which the claim is discharged or in the case of a claim which is rejected the date of rejection and the grounds therefor ,
- (d) a register of agents in which shall be entered the name and address of every agent employed by the society ;
- (e) a cash book in which must be entered separately for each class of contingency mentioned above all sums received and expended by the society and the matters in respect of which the receipt or expenditure takes place ;
- (f) a ledger ; and
- (g) a journal

Revenue Account and Balance-sheet :

Every provident society must at the expiry of each calendar year prepare a revenue account and balance sheet in the prescribed manner, together with a report on the general state of the society's affairs and have the revenue account and the balance sheet audited by an auditor who shall have all the powers given to an auditor under s 145 of the Indian Companies Act ²

Annual Statements :

Every provident society must at the expiry of each calendar year prepare with respect to that year ³

¹ Ibid, S 79

² Insurance Act, 1939, S 80 (1)

³ Ibid, S 80 (2)

- (a) a statement showing separately for each class of total amount insured thereby and the total premium income received in respect thereof and the number of existing policies discontinued during the year with the total amount insured thereby, and
- (i) the total amount of claims made and the total amount paid in satisfaction thereof ;
- (b) a statement showing details of every insurance effected on a life other than the life of the person insuring e.g., details regarding B when A effects a policy on the life of B.
- (c) a statement showing the total amount paid as allowances to agents and canvassers.

Actuarial Report and Abstract :

Every provident society must once in every five years or at such shorter intervals as may be laid down by the rules of the society cause an investigation to be made into its financial condition including the valuation of its liabilities and assets by an actuary.¹ The report of the actuary must contain an abstract which is to specify²—

- (a) the general principles adopted in the valuation, including the method by which the valuation age of lives was ascertained ;
- (b) the rate at each age of the mortality and any other factor assumed and the annuity values used in valuation;
- (c) the reserve values held against policies effected ;
- (d) the rate of interest assumed, and
- (e) the provision made for expenses.

A certificate by a principal officer of the society, that all materials necessary for proper valuation have been placed at the disposal of the actuary and that full and accurate particulars of every policy under which there is a liability, actual or contingent, have been furnished to the actuary for the purpose of investigation, must be appended to the report of the actuary.

If the actuary finds that the financial condition of the society is such that no surplus exists for distribution as bonus to the policy-

¹ Insurance Act, 1938, S. 81 (1).

² Ibid, S. 81 (2).

holders or as dividend to the share-holders he is to state in his report whether in his opinion the society is insolvent and, if so, whether it shall be wound up or not, and the extent to which in his opinion existing contracts should be modified or existing rates of premium should be adjusted to make good the deficiency in the assets.¹

Submission of Returns and Abstracts :

The revenue account and balance sheet with the auditor's report thereon, report of the general state of the society's affairs, annual statements, actuarial abstracts referred to above must be furnished by a society as returns to the Superintendent of Insurance within three months from the end of the period to which they relate -

Supply of Documents :

Every provident society must on demand deliver free of cost to any member of the society and to any non-member at a charge not exceeding Re 1 a copy of the rules of the society.² Every provident society must send to any member or policy-holder copies of the revenue account, the auditor's report, and report on the general state of the society's affairs within fourteen days from the receipt of the application made in this behalf and on payment of a fee not exceeding Re 1/- provided the application is made within two years from the date on which the document or documents were furnished to the Superintendent.³

Actuarial Examination of Schemes :

In the case of a society established after the commencement of the Act, every scheme of insurance which it proposes to put into operation must be examined by an actuary and the society cannot receive any premium or contribution in connection with the scheme until the actuary has certified that the scheme is sound and such certificate has been forwarded to the Superintendent of Insurance.

In the case of a society registered before the commencement of the Act, the requirement is the same as regards new schemes

¹ Insurance Act, 1938, S. 81 (3)

² Ibid, S. 82 (1)

³ Ibid, S. 76

⁴ Ibid, S. 82

which it proposes to put into operation after the commencement of the Act. In regard to old schemes, the society must submit all schemes of insurance which the society has in operation at the commencement of the Act to examination by an actuary and send the report of the actuary thereon to the Superintendent of Insurance before the expiry of six months from the commencement of the Act. The report of the actuary must state in respect of each scheme whether it is actuarially sound, and where no actuarial report has been made within two years preceding the report, the report must also state whether the assets of the society are sufficient to meet its liabilities under the existing schemes, and if not, how in the opinion of the actuary the existing contracts should be modified. If any scheme is reported by the actuary to be actuarially unsound, the Superintendent of Insurance must give notice to the society prohibiting the operation of the scheme; and the society cannot receive any premium or effect any policy in connection with the scheme after the expiry of one month from the receipt of the notice. Where a scheme is thus discontinued, the society must set apart out of its assets the sum sufficient in the opinion of the actuary to meet the liabilities incurred under the scheme so discontinued when its assets are sufficient to meet all existing liabilities. But if its assets are not sufficient to meet all existing liabilities it must apply to the Court within three months from such discontinuance for a modification of its existing contracts or failing such modification for the winding up of the society.¹

Separation of Accounts and Funds :

Where a provident society effects policies of insurance in connection with more than one of the classes of contingency mentioned above, the receipts and payments in respect of each such class must be recorded in a separate account in the cash book which is to be kept accordingly.²

Investment and Loan :

Every provident society must invest all surplus assets in Government securities on securities mentioned in s 20 of the

¹ Insurance Act, 1938, S. 84.

² Ibid, S. 85.

Indian Trusts Act until the total amount invested amounts to not less than fifty per cent of the total assets of the society and keep the same invested to the extent of such fifty per cent unless it already holds invested in such securities not less than fifty per cent of its total assets.¹ The funds or investments of a provident society except the deposit kept with the Reserve Bank must be kept in the name of the society.

No provident society can advance any loan to any of its directors or officers out of its assets except on the security of a policy of insurance held in the society and to the extent of the surrender value of such policy or to any concern of which a director or officer of the society is a director or partner²

Any director or officer of a society, which advances a loan in contravention of the above provision, who is knowingly a party to the above contravention will be jointly and severally liable to the society for the amount of the loan and such amount together with interest not exceeding 12% per annum will be recoverable by execution on the application by the Superintendent of Insurance to any competent Court as if a decree for such amount had been passed by that Court. Such director or officer is also liable for other penalties provided by the Act³

Inspection of Books :

The books of every provident society must at all reasonable times be open to inspection by the Superintendent of Insurance or any person appointed by him for the purpose or by any member or policy-holder of the society who has made an application for the purpose to the Superintendent of Insurance⁴

Inquiry by the Superintendent of Insurance :

The Superintendent of Insurance must at least once in two years and may, at any other time, if he thinks fit, visit personally or depute a suitable person to visit the principal office of a provident society and inquire into the solvency of the society and the manner

¹ Ibid, S. 85 (3)

² Ibid, S. 85 (4).

³ Ibid, S. 85 (4)

⁴ Ibid, S. 86

in which the business of the society is conducted, or may, after giving notice to the society and giving it an opportunity to be heard, direct such an enquiry to be made by an auditor or actuary appointed by him.¹ For the purpose of any such enquiry the superintendent or the auditor or actuary, as the case may, will be entitled to examine all books and documents of the society and may demand from the society or any officer of the society such explanations as he may require on any matter relating to the affairs of the society.² The results of any such enquiry are to be recorded in a report which is to be kept in the office of the Superintendent and a copy of the Report must be sent to the society concerned and be open to inspection by any member or policy-holder of the society.³

Managing Agents :

A provident society, like an ordinary insurance company, cannot employ a managing agent and the prohibition is the same as in the case of ordinary insurance companies.

Assignment and Nomination :

The assignment and nomination of a policy in a provident society is subject to the same law as in the case of assignment of a life insurance policy. We have already studied it. The only difference in the case of a policy in a provident society is that in regard to nomination, no nomination is valid unless the nominee is the husband, or wife, or father, or mother, or child, or grand-child, or brother, or sister, or nephew, or niece of the holder of the policy.⁴

Reduction of Insurance Contracts :

The Court may make an order reducing the amount of the insurance contracts of a provident society upon such terms and subject to such conditions as the Court thinks just on the following grounds⁵ :—

(a) If where the society is insolvent or is likely to become

¹ Ibid, S. 87 (1).

² Ibid, S. 87 (2).

³ Ibid, S. 87 (3).

⁴ Insurance Act, 1938, S. 97 (2).

⁵ Ibid, S. 89.

so, the Superintendent applies to the Court recommending that the contracts of the society should be reduced in such manner and on such conditions as he may indicate as an alternative to cancelling the registration of the society ;

- (b) If while a society is in liquidation the Court thinks fit.
- (c) If when a society has been proved to be insolvent the Court thinks fit to do so in place of making an order for the winding up of the society , or
- (d) If the Court is satisfied on an application made in this behalf by the society supported by the report of an actuary, and after giving the policy holders an opportunity to be heard that it is desirable to do so

Winding up :

In addition to the grounds on which a company may be wound up by Court under the Indian Companies Act, 1913, the Court may order the winding up of a society if its registration is cancelled and in such a case the Superintendent may himself order the winding up of the society¹ But a provident society cannot be wound up voluntarily whether it is a company or not except for the purpose of effecting an amalgamation or reconstruction of the society or on the ground that by reason of its liabilities it cannot continue its business

Appointment of Liquidator :

When a provident society is wound up either by Court or voluntarily, the society must give notice of the order or resolution authorising the winding up to the Superintendent of Insurance within seven days from the date of such order or resolution. In a voluntary liquidation the Superintendent must appoint the liquidator and fix his remunerations. Such a liquidator may be removed by the Superintendent if he fails to discharge his duties properly.²

Powers of Liquidator :

A liquidator appointed to wind up a society has the power³:—

¹ Ibid, S. 88.

² Insurance Act, 1938, S. 90.

³ Ibid, S. 91.

- (a) to institute or defend any legal proceedings on behalf of the society by his name of office ;
- (b) to determine the contribution to be made by members of the society respectively to the assets of the society , the liquidator has the same power for settling the list of contributories and realising the amount of contribution, as of the official liquidator under the Indian Companies Act, 1913
- (c) to investigate all claims against the society and to decide questions of priority arising between claimants ;
- (d) to determine by what persons and in what proportion the costs of the liquidation are to be borne ,
- (e) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society
- (f) to summon, and enforce the attendance of witnesses and to compel the production of documents by the same means and as far as may be in the same manner as provided in the case of civil courts , and
- (g) with the sanction of the Superintendent of Insurance to employ such establishment and to obtain such assistance from an actuary or an auditor as may be necessary for the discharge of his duties

Procedure at Liquidation :

Collecting the property -The liquidator must take charge of all property moveable or immoveable of the society and of all its books and documents¹ If any proprietor or officer of the society fails to deliver to the liquidator any book or document when so required by the liquidator, he will be punishable with imprisonment which may extend to six months or with fine which may extend to Rs 500/- or both and the Court may order the delivery of the assets or book or document to the liquidator²

Creditors' Meeting :

The liquidator must hold a meeting of creditors between twenty one and twentyeight days after his appointment and he

¹ Insurance Act, 1938, S. 92 (1).

² Ibid, S. 92 (2).

must send notice by post of such meeting within fifteen days of his appointment to every person who appears to him to be a creditor of the society specifying the date, hour and place of the meeting and also advertise notice of the meeting once in the local official Gazette and once at least in two newspapers circulating in the province in which the society is situated¹

Committee of Inspection - At the meeting of the creditors so convened the creditors are to determine whether they should apply for the appointment of any person as liquidator in the place of or jointly with the liquidator already appointed, or for the appointment of a committee of inspection. If they decide on any one of the above courses open to them they must apply by a creditor chosen for the purpose to the Superintendent of Insurance within fourteen days after the date of the meeting conveying their decision and the Superintendent is to appoint thereupon a suitable person in place of or jointly with the liquidator already appointed or if so desired a committee of inspection. If a committee of inspection is appointed, it will, subject to any prescribed conditions, have a general power of supervision over the acts of the liquidator and will have the right to inspect his account at all reasonable times²

Ascertainment of Liabilities and Assets :

The liquidator is to ascertain as soon as possible with such assistance from an actuary as may be required, the amount of the society's liability to every person appearing by the society's books to be entitled to or interested in any policy issued by the society and is to give notice of the amount so found to each such person in the prescribed manner and each such person on receiving such notice will be bound by the value so ascertained³

The liquidator must also make a valuation of the assets of the society and an estimate of the costs of the winding up and settle the list of contributors on the basis of these⁴

Collection of Deposit and Distribution of Asset :

The liquidator must also apply to the Superintendent of

¹ Ibid, S 91 (3)

² Insurance Act, 1938 S 92

³ Ibid, S 92.

⁴ Ibid, S 92 (6)

⁵ Ibid, S. 92 (7)

Insurance for the return of the deposit who must order the return of the same on such application subject to such terms and conditions as he may think fit.¹ In administering and distributing the assets of the society the liquidator must have regard to any directions that may be given by the creditors or contributories at a general meeting or by the Superintendent of Insurance.²

The liquidator must keep books of account in which he must record the proceedings at all meetings attended by him, all amounts received or expended by him and any other matter that may be prescribed, and these books may, with the sanction of the Superintendent, be inspected by any creditor or contributory.³

If the winding up continues for more than a year, the liquidator must summon a meeting of the creditors and contributories at the end of the first year and of each succeeding year, and must lay before them an account of his acts and dealings and of the conduct of the winding up and such account together with any views expressed thereon by the meeting must be forwarded by the liquidator to the Superintendent of Insurance.⁴

Subject to the provisions of the Act the liquidator should as far as practicable follow the procedure prescribed for the official liquidator under the Indian Companies Act, 1913.⁵

Dissolution of Provident Society :

As soon as the affairs of a provident society are fully wound up the liquidator must prepare an account of the winding up showing how the winding up has been conducted and the property of the society has been disposed of and must call a meeting of members, creditors, and contributories for the purpose of laying before it the account and giving any explanation thereof.⁶ Notice of the meeting has to be sent to each person individually and advertised in the local official Gazette and in at least two newspapers circulating in the province in which the society is situated.⁷

Within one week after the meeting the liquidator must send

¹ Ibid, S. 92 (8).

² Insurance Act, 1938 S. 92 (d).

³ Ibid, S. 92 (10).

⁴ Ibid, S. 92 (11).

⁵ Ibid, S. 92 (12).

⁶ Ibid, S. 93 (1).

⁷ Ibid, S. 93 (2).

to the Superintendent of Insurance a copy of the account and report to him the holding of the meeting and its date and forward to him a copy of the proceedings of the meeting¹. The Superintendent may return the account to the liquidator if it is incomplete or unsatisfactory and may require the liquidator to carry out any further steps necessary to complete the winding up and the liquidator must comply with such requirement and submit a further report to the Superintendent within six months. But if the Superintendent is satisfied that the affairs of the society have been fully wound up he must register the account of the liquidator who has to forthwith make over to the Superintendent such sums, if any, as might remain undisposed of. On the expiry of three months from the registering of the account the Superintendent must declare the society dissolved and notify the dissolution in the local official Gazette and the liquidator will thereupon be discharged from further responsibility². The sums, if any, made over by the liquidator, to the Superintendent prior to his discharge become the property of the Government if no order is obtained by any claimant from a competent court in respect of the disposal of such sums within a period of five years from the date on which such sums were made over to the Superintendent³.

Mutual Insurance Companies and Co-operative Life Insurance Society :

Definition :

A mutual insurance company means an insurer, being a company incorporated under the Indian Companies Act, 1913 which has no share capital and of which by its constitution only all policy holders are members⁴.

A co-operative life insurance society means an insurer being a society registered under the co-operative societies Act, 1912, or under an act of a Provincial Legislature governing the registration of co-operative societies, which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members

¹ Insurance Act, 1938 S. 93 (3)

² Ibid, S. 93 (4)

³ Ibid, S. 93 (5)

⁴ Ibid, S. 93 (6)

⁵ Insurance Act, 1938, S. 95 (1).

on whose application the society is registered and all policy-holders are members.¹

Other co-operative societies (*i.e.*, societies not carrying on life insurance business) may be admitted as members of a co-operative life insurance society, without being eligible to any dividend, profit or bonus.²

A provincial Government may, subject to any rules made by the Central Government, empower the Registrar of co-operative societies of the province to register co-operative societies for the insurance of cattle or crops or both under the provisions of the co-operative societies Act in force in the province. A provincial Government may also make rules not inconsistent with any rules made by the Central Government to govern such societies and if any provision in the Act is inconsistent with those rules, such provision will not to that extent apply to such societies.

Working Capital :

The earlier provisions of the Act in respect of working capital do not apply to a mutual insurance company or to a co-operative insurance society.³ The requirement as to working capital for these are as follows. No mutual insurance company incorporated after 26th January, 1937 and no co-operative insurance society registered after that date can be registered under the Act, unless it has as working capital a sum of Rs. 15,000/- exclusive of deposit to be made before or at the time of applications for registration and of preliminary expenses, if any, incurred in the formation of the company or society.⁴

Deposit :

Every Mutual Insurance Company and every co-operative life Insurance society must, in respect of the life insurance business carried on by it in British India, deposit and keep deposited with one of the offices in India of the Reserve Bank of India, for and on behalf of the Central Government, a sum of Rs. 2,00,000/- in cash or in approved securities estimated at the market value of the

¹ Ibid, S. 95 (1).

² Ibid, S. 95 (2).

³ Ibid, S. 95 (3).

⁴ Ibid, S. 96.

⁵ Insurance Act, 1938 S. 97.

securities on the day of deposit.¹ The deposit may be made in instalments of which the first instalment must be of Rs. 25,000/- to be made before or at the time of the application for registration and the subsequent instalments must be annual instalments made before the expiry of each subsequent year of an amount in cash or in approved securities estimated at the market value of the securities on the day of the payment of the instalment, equal to one-third of the gross premium income received in the previous year.²

Assignment and Transfer :

The law relating to assignment is the same with regard to policies issued by these companies or societies as in the case of other policies excepting that an assignee or a transferee will not become a member of a mutual insurance company or a co-operative insurance society merely by reason of any such transfer or assignment.³

Publication of Notices and Documents :

Notwithstanding anything contained in the Indian Companies Act, 1913, a mutual Insurance company and a co-operative Life Insurance Society may, instead of sending the notices and the copies of the balance sheet, revenue account, and other documents which they are required to send to the members under the Indian Companies Act, 1913, secs. 79 and 131, publish such notices or documents once in a newspaper published in the English language and in a newspaper published in one Indian language circulating in the place where the principal office of the company is situated and, in case any members of the company are domiciled in any other province, in a newspaper or newspapers published in the principal languages of that province and circulating therein. But this does not relieve a mutual insurance company from filing the balance sheet and profit and loss account with the Registrar of joint stock Companies of the province under s. 134 of the Indian Companies Act, 1913 or a co-operative life insurance society from filing such documents with the Registrar of co-operative societies of the province as he is required under the co-operative societies Act, 1912 or any other Provincial legislation.⁴

¹ Ibid, S. 98 (1).

² Insurance Act, 1938, S. 98 (2).

³ Ibid, S. 99.

⁴ Insurance Act, 1938, S. 100.

Supply of Documents to Members :

Every Mutual Insurance Company and every Co-operative Life Insurance Society must furnish a copy of the document or documents filed with the Registrar of Joint Stock Companies or the Registrar of co-operative societies as the case may be to a member free of cost within fourteen days of the application made by the member in this behalf, provided the application is made by the member within two years from the date on which such document or documents are filed.¹

Penalties :

Penalty for non-compliance with the provisions of the Act :—

Any insurer who makes default in complying with or acts in contravention of any requirement of the Act and, where the insurer is a company, and director, managing agent, manager, or other officer of the company, or where the insurer is a firm, any partner of the firm who is knowingly a party to the default, is punishable with fine which may extend to Rs. 1000 - and in the case of a continuing default, with an additional fine which may extend to Rs. 500/- for every day during which the default continues.²

Any provident society which makes any default in complying with any requirement of the Act applicable to it and any director, managing agent, manager, secretary, or other officer of the society who is knowingly a party to the default is punishable with fine which may extend to Rs. 500/- or in the case of a continuing default with fine which may extend to Rs. 250 for every day during which the default continues.³

Penalty for Non-compliance with the Requirements Regarding Capital and Deposit :

But where the default is in respect of the requirements as to working capital and deposit, an insurer or any one acting on behalf of an insurer who transacts any class of insurance business in contravention of these requirements is punishable with fine

¹ Ibid, S. 101.

² Insurance Act, 1938, S. 102 (1).

³ Ibid, S. 102 (2).

which may extend to Rs. 2000/-, and any one taking out a policy from an insurer or person who, to his knowledge, has contravened or continues to contravene these requirements is punishable with fine which may extend to Rs. 500/-¹.

Penalty for false statement in a document :—Any person wilfully and knowingly making a false statement in respect of any material particular in any return, report, certificate, balance-sheet or other document required to be furnished under the Act, is punishable with imprisonment for a term which may extend to three years or with fine which may extend to Rs. 1000/- or with both.²

Penalty for Wrongful Withdrawal or Withholding of Property :

Any director, managing agent, manager or other officer of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it for purposes not authorised by the Act is, on the complaint of the insurer or any member or policy-holder, punishable with fine not exceeding Rs. 1000/- and may be ordered by the Court to deliver up within a time the property so wrongfully obtained or withheld or misapplied and in default to suffer imprisonment for a term not exceeding two years.³ In the case of liquidation of a provident society every officer, manager, proprietor or director of the society who withholds any property or books or assets from the liquidator when so required by the liquidator, will be punishable with imprisonment which may extend to six months, or with fine which may extend to Rs. 500/- or both and the court may order the delivery of the assets, or book or property to the liquidator.⁴

Penalty for Wrongfully Diminishing Life Insurance Fund :

Where an Insurance Company is in liquidation and the court is satisfied, on the application of the insurer or any member of the insurance company or any policy holder or the liquidator of the company, that by reason of any contravention of the provisions

¹ Ibid, S. 103 (1), (2).

² Insurance Act, 1938 S. 104.

³ Ibid, S. 105.

⁴ Ibid, S. 91 (2).

of the Act the amount of the life insurance fund has been diminished, every person who was at the time of the contravention a director, manager, liquidator or an officer of the company will be deemed guilty of misfeasance unless he proves that the contravention occurred without his consent or connivance and was not facilitated by any neglect or omission on his part. Any person guilty of such misfeasance may be proceeded against by the Court under secs. 235 and 237 of the Indian Companies Act and the Court has also the power to assess the sum by which the amount of the life insurance fund has been diminished by reason of the misfeasance and to order any person guilty thereof to contribute to that fund the whole or any part of that sum by way of compensation.¹

Sanction of the Advocate-General :—No proceeding against an insurer, or any director, manager or other officer of an insurer under this Act can be instituted by any person except the Superintendent of Insurance without the sanction of the Advocate General of the province in which the principal place of business of the insurer is situate.

Relief by Court :—Where any person is liable in respect of negligence, default, breach of duty or breach of trust in relation to an insurer, the Court may relieve him of his liability on such terms as it thinks fit if it appears to the Court that he has acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused of his liability.²

Cognizance of offences :—Only a Presidency Magistrate or a Magistrate of the first class can try any offence under the Act.³

¹ Insurance Act, 1938, S. 105.

² Ibid, S. 108.

³ Ibid, S. 109.

CHAPTER IX.

MORTGAGE.

A mortgage is a transfer of an interest in specific *immovable* property for the purpose of securing payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Thus, a mortgage may be (1) to secure a debt, or (2) to secure the performance of an engagement (S 58 of the Transfer of Property Act)

Classes of Mortgage :

Mortgages are of six kinds —

(1) Simple mortgage, (2) Mortgage by conditional sale, (3) Usufructuary mortgage, (4) English Mortgage, (5) Mortgage by deposit of title deeds, and (6) Anomalous mortgage

(1) Simple mortgage :

In a simple mortgage the mortgagor binds himself *personally* to pay the mortgage money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied in payment of the mortgage money. In this kind of mortgage the mortgagor, however, remains in possession of the mortgaged property

(2) Mortgage by conditional sale :

In this type of mortgage the mortgagor ostensibly sells the mortgaged property to the mortgagee on condition—

(i) that on default of payment of the mortgage-money on a certain date the sale shall become *absolute*, or

(ii) that on such payment being made the sale shall become void, or

(iii) that on such payment being made the mortgagee shall re-transfer the mortgaged property to the mortgagor.

(3) Usufructuary mortgage :

In this kind of mortgage the mortgagor delivers or agrees to deliver the possession of the mortgaged property to the mortgagee,

and authorises him to collect the rents and profits accruing therefrom, and appropriate such rents and profits towards the payment of the principal money and interest owing on the mortgage debt.

(4) English mortgage :

Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but on condition that the mortgagee will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

An English mortgage is very similar to a mortgage by conditional sale. But there are fundamental differences between the two which may be stated as follows :—

- (a) In English mortgage the mortgagor binds himself to repay the loan on a certain day. But such an undertaking is not necessary in a mortgage by conditional sale.
- (b) In English mortgage there is an absolute sale of the property at the outset and the ownership of the mortgagee is complete, only to be divested in case the mortgagor pays on the appointed date. But in a mortgage by conditional sale, the sale is complete only on default of the mortgagor to pay on the appointed date, and the ownership of the mortgagee is qualified, which may become absolute if the mortgagor defaults.

(5) Equitable mortgage or mortgage by deposit of title deeds :

Where a borrower borrows money by depositing title deeds of immovable property by way of security, the transaction is called an equitable mortgage or mortgage by deposit of title deeds. In an equitable mortgage the following conditions must be satisfied :—

- (a) there must be delivery of title deeds to the creditor ;
- (b) there must be an intention to make the title deeds security for the loan ;
- (c) the mortgage must be created in the towns of Calcutta, Bombay, Madras, Karachi, Rangoon and a few other towns.

(6) Anomalous mortgage :

Any mortgage which does not belong to any of the above classes is called an anomalous mortgage. The customary mortgages of India belong to this class.

Rights of the mortgagor :

A mortgagor has the following rights in respect of the mortgaged property :

1. He can, at any time after the mortgage debt has become due, get back the mortgaged property, provided he has paid or offered to pay the mortgagee the full amount of the mortgage debt. On such payment or offer of payment the mortgagee, if he is in possession must deliver the possession of the property to the mortgagor, and, if he has any documents of the mortgagor, he must return the same. This right of the mortgagor to get back his property is known as the equity of redemption. This right can never be destroyed even if the mortgagor contracts to give away this right.

2. Where the mortgagor has deposited his title deeds to the mortgagee he can inspect and make copies of the deeds at his own expense.

3. Where the mortgagee effects improvements on the mortgaged property while the property is in his possession the mortgagor is always entitled to the improvements. But the mortgagee can charge the cost of such improvement on the mortgagor, provided the improvement was necessary for preserving the property and preventing waste.

4. Where the mortgagee in possession of the mortgaged property renews the lease of the property, the mortgagor, on redemption of the property, becomes entitled to the renewed lease.

5. Where the mortgagee in possession of the mortgaged property makes additions to the property, the mortgagor, on redemption, becomes entitled to such accretion.

Rights of the Mortgagee :

The mortgagee has the following rights :—

(1) He can obtain a decree for foreclosure against the mortgagor by which the mortgagor is deprived of his right of redemption and the mortgagee becomes the absolute owner of the

property. Foreclosure is granted only in case of mortgage by conditional sale where the mortgagor fails or neglects to pay the debt long after it becomes due.

(2) He can sell the property if the principal money with interest is not paid by the mortgagor after it has become due and he can realise his dues from the proceeds of the sale. In case of usufructuary mortgage and mortgage by conditional sale this right of sale cannot be exercised.

(3) He can sue for the mortgage money where—

- (a) the mortgagor has bound himself personally to pay the money, as in a simple mortgage ;
- (b) the mortgaged property has become insufficient to pay for the debt without the fault of either the mortgagor or the mortgagee ;
- (c) the security, whether property or title deeds, has been partially or totally lost due to the mortgagor's fault ;
- (d) the mortgagee is entitled to possession of the mortgaged property, as in mortgage by conditional sale or English mortgage, and the mortgagor is not giving him undisturbed possession.

Hypothecation :

The mortgage of movable property is called hypothecation. Neither the Contract Act nor the Transfer of Property Act deals with the problem of hypothecation, but it is well settled now that the mortgage of movable property, although unaccompanied by delivery of possession, is called hypothecation. (*Deans vs Richardson*, 1871, 3 N. W. P. 54). It is also well settled that the hypothecatee can enforce his claim even against a *bonafide* transferee for value without notice of the hypothecatee's claim. Thus in *Shyam Sundar vs. Chetia* 1871, 3 W. R. 71, the hypothecatee was allowed to enforce his security against a purchaser from the mortgagor or the hypothecator who had purchased the hypothecated goods for a value and without notice of the hypothecatee's claim. It is submitted that this state of law in India is certainly very unsatisfactory. In the case of the mortgage of immovable property which can be created by registration only, any person dealing with the mortgaged property has automatically notice of the mortgage from the fact of registration, but in the case of mortgage of movable property, a third party can hardly know

himself of the mortgage since registration is not necessary. It is submitted that the law regarding hypothecation should be thoroughly overhauled in order to protect bonafide purchasers from fraudulent persons who deal with their property after having mortgaged the same without informing the purchaser of the same.

Lien :

Lien in its primary sense has been defined in Halsbury's Laws of England, as a right in one man to retain that which is in his possession belonging to another, until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract, for contract restricts a person's right to the stipulations in the contract. Such a lien is incidental to possession, but in exceptional cases such as in the case of liens for seamen's wages and Bottomry a lien may arise even without possession and may be enforced even against *bonafide* purchasers of the ship.

Lien is of two kinds *viz* possessory and equitable

Possessory lien :

Possessory lien is again of two kinds, *viz* (a) General lien and (b) Particular lien. A general lien entitles a person in possession of goods to retain them until all claims or accounts of the persons in possession against the owner of the goods are satisfied. Such general lien has been established in the case of solicitors, bankers, factors, stock brokers, warehouse-keepers and insurance brokers.

A particular lien, on the other hand, is a right to retain goods, until all charges incurred in respect of those goods only, have been paid. If the owner of the goods pays such charges, the goods cannot be retained until payment of the general balance due to the person having the particular lien. Thus a common carrier is under a legal obligation to carry goods and by way of compensation for such obligation, is entitled to retain the goods until the charge for carriage is paid. It has also been seen before that unpaid sellers have liens under particular circumstances.

Equitable lien :

An equitable lien is an equitable right, conferred by law upon one person to a charge upon the real or personal property of another

until certain specific claims have been satisfied. Thus a vendor of land has an equitable lien on the land sold for the whole or part of the purchase money until actual payment.

Termination of lien :

A lien is terminated under the following circumstances

- (a) Payment by the debtor of the amount due to the holder of the lien
- (b) The abandonment of the claim for a number of years, or claiming to retain the goods on grounds different from those on which the creditor rests his claim for lien making no mention of the lien, or claiming the lien for a particular debt where the lien is for a general balance
- (c) Acceptance of security by the creditor for the debt showing an intention to waive the lien
- (d) Delivery of the goods to the owner or his agent. Once delivery is given to the owner, the lien cannot be revived, but if the owner takes possession by fraud the lien revives if possession is recovered

Pledge :

This subject has already been dealt with under the Law of Contract

Distinction between the different types of security mentioned above :

A mortgage differs from a hypothecation in that mortgage refers to immovable property whereas hypothecation refers to movable property. A mortgagee's right to sue is governed by the Transfer of Property Act and Order 34 of the Civil Procedure Code. But a hypothecatee's right to sue is not governed by any specific statute. His remedy is by way of a suit for sale of the property hypothecated and for declaration of charge in his favour. It has also been observed that hypothecation can be created without registration, whereas a mortgage cannot be created without registration.

A pledge comes nearest to hypothecation. But even then there are differences between the two. In pledge, there must be

an actual or constructive delivery of possession of the goods pledged to the pledgee or pawnee, but in hypothecation the goods need not be delivered to the hypothecatee. A hypothecatee cannot sell the hypothecated goods without a decree of the court. But a pledgee can himself sell the goods pledged without a decree of the court, after giving a reasonable notice to the pawnor.

All the aforementioned securities differ from a lien in that the former are the creation of agreement between the parties whereas a lien is the creation of law under certain circumstances irrespective of the agreement of the parties. A lien is also only a defensive right and cannot be enforced by a suit or by sale of the properties over which the lien is claimed. The only right that the holder of a lien enjoys is to retain the goods until his dues are satisfied.

CHAPTER X

LAW RELATING TO CARRIAGE OF GOODS

Introduction :

Goods are carried by land, sea and air. There are rules of law which regulate such carriage of goods. They fix the liability, duty and rights of the consignor and the carrier. The inland transportation of goods is done by common carriers, private carriers, gratuitous carriers and the Railways. Prior to the passing of the Indian carriers Act (III of 1865) and the Indian Railways Act (IX of 1890) the law relating to carriers in India was governed by the English common law relating to carriers¹. The Indian Carriers Act (III of 1865) was passed with a view to limit the liability of common carriers imposed on them by the English common law and also to declare their liability for the negligence or criminal acts of themselves, their servants or agents². The Indian carriers Act is largely based on the English Carriers Act, 1830. It applies to common carriers transporting goods for hire from place to place by land or inland navigation. Thus private carriers and carriers by sea are not affected by the Act. Even in the case of common carriers by land or inland navigation the Act does not displace the English common law altogether except in so far it limits the liability of such carriers in certain cases and precludes them from contracting out of their common law liability in the case of negligence and criminal acts of themselves or their agents. Thus the English common law so far as it is not modified by the Carriers Act, 1865 still regulates the duties and liabilities of such carriers in India³. The carriers Act, 1865 is now amended by two further Acts namely Act X of 1899 and Act XIII of 1921. Private carriers and gratuitous carriers were liable as under the English common law and their position must be the same in India⁴, their duties and liabilities being governed by the Indian

¹ *Chagemal vs. The Port Commissioner of Calcutta*, 18 Cal. 427. *Mathura Kant Shaw vs. India General Steam Navigation Co.*, 10 Cal 116 (181) F.B.; *E. I. Ry. Co. vs. Jordan*, 4 B.L.R.O.C. 97.

² Preamble to the Indian Carriers Act, 1865.

³ *Mothooru Kant Shaw vs. India General Steam Navigation Co.*, supra (see Mitter J.).

⁴ *Coggs vs. Bernard*, 1 Sm. L.C. 175.

contract Act¹. The duties and liabilities of railways were the same as those of common carriers under the English Law before the passing of the Railways Act (IX of 1890)². But the Railways Act, 1890, has now limited their liabilities to those of a bailee.³ The law relating to carriage of goods by sea in India continued to be governed by the English common law, unaffected by the carriers Act or the Railways Act, until the passing of the Carriage of Goods by Sea Act (XXVI of 1925) which now regulates the carriage of goods shipped from Indian ports under bills of lading. But even now carriage of goods by sea under a charter party or in respect of cases not covered by the Carriage of Goods by Sea Act, 1925, i.e., the rights and duties of the master, or the law relating to bottomry and *respondentia* or the question of salvage, would be governed by the common law of England⁴.

Kinds of Carriers :

The term 'carrier' is of very wide denotation and covers any one who carries goods or passengers whether for reward or not and is wide enough to include a railway owned and controlled by Government which takes upon itself the duty of carrying goods from one place to another'. Carriers are broadly divided into (a) carriers of goods and (b) carriers of passengers. Carriers of goods are again subdivided into (i) common or public carriers, (ii) private carriers and (iii) gratuitous or voluntary carriers⁵.

Common Carriers :

A common carrier has been defined by the Indian Carriers Act, 1965⁷, as a person including any association or body of persons whether incorporated or not, other than the Government engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately. We may set out the essential features of a common carrier as follows:—

(a) It may be a person, or a partnership or a joint family

¹ See the Law of Contract, supra; S 151, 152 & 161 of the Indian Contract Act.

² *E I Ry. Co v Jordan*, supra.

³ S 72

⁴ *Irrawady Flotilla Co vs. Bhagwandas*, LR 18 IA 121.

⁵ *Secretary of State v Golab Rai Paliram*, LR (1937) 2 Cal. 614 (620).

⁶ *Hari Rao's Indian Railways Act*, P. xii

⁷ Section 2.

business or a company. If it is a partnership firm all the partners will be jointly and severally subject to the liabilities of a common carrier. If it is a joint family business, all the members, adult and minor, will incur the liabilities of common carrier.

- (b) It must transport goods or property and not persons.
- (c) It must transport goods as a business and not merely as casual occupations
- (d) It must transport goods for hire and not gratuitously.
- (e) It must carry goods indiscriminately for all *ie*, for anyone who wants to employ it. It cannot choose to serve some people and refuse to serve others. A carrier who reserves the right of accepting or rejecting goods cannot be considered a common carrier¹
- (f) It must transport by land and inland navigation. Thus a carrier by sea is not to be regarded as a common carrier.

(g) It must not be the Government¹

It is clear, therefore, that many carriers who would be regarded as common carriers under the English law are not to be considered as such under the Indian carriers Act, *e.g.* carriers by sea or carriers of passengers

Duties of a Common Carrier :

The duties of a common carrier may be set out as follows -

- (1) A common carrier must carry the goods of all persons offering to pay a reasonable charge for carriage². Unless, of course, the goods are not of the description which he professes or is accustomed to carry³ or are of such nature as would expose him to exceptional danger⁴, or there is no accommodation for the goods⁵, or the

¹ *Coggs vs Barnard*, 1 Sm LC 12th Ed 191

² *Mackillican vs The Compagnie Des Messageries Maritimes De France*, 6 Cal 227

³ *Alamgir Footwear and Co vs. Secretary of State*, (1933) All. 466

⁴ *Wylde vs. Pickford*, (1841) 8 M. & W. 443.

⁵ *Great Western Railway vs Sutton*, (1868) LR 4 HL 226, *Oxlade vs. N. E. Ry. Co.*, (1860) 15 C.B.N.S. 680

⁶ *Edwards vs. Sherratt*, (1891) 1 East 604; *G N Ry. Co. vs L E P Transport Co.*, (1922) 2 K.B. 342.

⁷ *Edwards vs. Rogers*, (1863) 2 Show, 327.

goods are brought too late or too long a time before the journey is to begin.¹ If he refuses to carry the goods without justification (*i.e.*, except on the grounds mentioned above) he may be sued by the consignor of the goods. It was observed in *G W Ry Co v Sutton*², by Blackburn J., "The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for doing so) on being paid a reasonable compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing, and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him."

- (2) A common carrier must deliver the goods at the time agreed upon, or, where no time is stipulated within a reasonable time having regard to the circumstances of the case³
- (3) A common carrier is bound to carry goods by the ordinary route which he professes to be his route⁴. But this need not be the shortest route. He is, however, entitled to deviate from the ordinary route if that be necessary for the safe carriage of the goods and in that case the delay and deviation would be excused⁵
- (4) A common carrier must deliver the goods to the consignee and to provide a place for their delivery. He will be liable for any loss arising from his neglect to do so⁶. But in the absence of agreement he is not bound to deliver the goods at the house of the consignee

¹ *Pickford v Grand Junction Ry.* (1844) 12 M & W 166

² (1869) L R 4 H L 226, 237

³ *Taylor v Great Northern Railway*, (1855) 1 R 1 CP 385 L & N W Ry Co v Neilson (1922) 2 AC 263; *Dunn v Bucknall Bros.*, (1902) 2 KB 614

⁴ *Foster v G W Ry.* (1904) 2 K.B. 306

⁵ *Hales v London and North Western Railway*, (1863) 4 B. & S. 66

⁶ *Taylor v. G. N Ry Co.*, (1866) L R 1 CP at p. 388

⁷ *Roth v. N. E. Ry. Co.*, L.R. 2 Ex 195, 179

and his liability ceases when he has brought the goods to the station of destination, and given to the consignee notice of arrival and allowed the consignee a reasonable time in which to remove the goods¹

Rights of a Common Carrier :

The following are the rights of a common carrier :—

- (1) He is not bound to carry goods unless the sender is ready and willing to pay his reasonable charge or there is accommodation for the goods or the goods are of the description which he is accustomed to carry or the goods are not likely to subject him to exceptional danger—
- (2) He is not bound to treat all customers equally and may at his option allow special concessions to some only. He is not, however, allowed to charge an unreasonable payment from any customer². ‘The reasonableness of the charge must be measured by reference to the service rendered and the benefit received³, and this has to be determined without reference to the prosperity or misfortune of the parties to the contract⁴. But the fact that he charged other customers less may be evidence that a particular charge is unreasonable⁵’
- (3) He has a particular lien on the goods he carries in respect of his charges and he can retain the goods until his charges are paid⁷

Liability of a Common Carrier :

The liabilities of a common carrier in India are the same as under the English common law subject to the modifications introduced by the carriers Act, 1865. Under the English common law a common carrier stands in the position of an insurer for the safe delivery of the goods intrusted to him for carriage and he is bound

¹ *Mitchell vs. L. & S. Ry. Co.*, (1895) L.R. 10 Q.B. 256

² See *supra*

³ *G. W. Ry. Co. vs. Sutton*, (1869) L.R. 4 H.L., 226 at 237.

⁴ *Canada Southern Ry. Co. vs. International Bridge Co.*, 8 A.C. 723 at 731, 732.

⁵ *Pr. Collins J.*, in *Rickett Smith & Co. vs. Midland Ry. Co.*, (1896) 1 Q.B. 269 at 265.

⁶ *Pr. Blackburn J.* in *G. W. Ry. Co. vs. Sutton*, *supra*

⁷ *Skinner vs. Upshaw*, (1802) 2 Ld. Raym. 752.

to indemnify the owner of the goods, whether the consignor or the consignee, for loss of or damage caused to the goods while in his custody irrespective of any question as to how such loss or damage was caused or whether he took all such reasonable care as a man of ordinary prudence would, under similar circumstances, take of his own goods. As the Privy Council observed in *Irrawady Flotilla Co. v. Bhagwandas*¹ 'In England the liability of a common carrier for safe delivery of goods intrusted to his care has been always treated as independent of the contract to carry and was founded on common law and custom under which he is regarded as an insurer of the goods intrusted to his care'. This has been held to be the law in India as well by a full Bench of the Calcutta High Court in *Mathra Kant Shaw v. Indian General Steam Navigation Co.*,² which was later on approved by the Privy Council in the case noted above³. It was further observed by the Full Bench in the above mentioned Calcutta case that the provisions in the Indian Contract Act relating to the liabilities of bailee⁴, had made no difference in the law on the subject.

Apart from the liabilities of an insurer, a common carrier may incur liability to the owner of the goods for any damage or loss which the latter may suffer in consequence of any breach of duty by the carrier even though the goods may have arrived safely e.g. if the owner suffers damage independently of any deterioration of the goods themselves owing to the delay in delivering the goods'. Thus where the plaintiff consigned certain books by railway for selection by a committee as text books for schools and the books did not reach the destination until long after such selection was made due to an extraordinary delay in transit so that the books became completely valueless for the plaintiff, it was held that the plaintiff was entitled to the price of the consignment by way of damages⁵.

The liability of a common carrier is, however, subject to certain

¹ 18 I.A. 121.

² 10 Cal. 166.

³ *Irrawady Flotilla Co. vs. Bhagwandas*, supra.

⁴ Ss. 151 & 152.

⁵ *B. N. Ry. Co. & E. I. Ry. Co. vs. Sheikh Dillu & Ors*, A.I.R. (1925) Nag. 350.

⁶ *Secretary of State vs. School Book and Apparatus Depot*, A.I.R. (1933) Oudh, 339.

exceptions and modifications, some of which are recognised by the common law and some of which are statutory *i.e.*, imposed by the Carriers Act of 1865. We may note these exceptions below.

Exceptions under the Common Law :

The common law recognises certain exceptions which have the effect of either relieving the liability of the common carrier altogether in certain cases or of reducing such liability from that of an insurer to that of an ordinary bailee. These exceptions are as follows :—

- (1) A common carrier is relieved of liability altogether in case of loss of or damage to the goods intrusted to its care if such loss or damage is caused by (a) an act of God *e.g.*, a tempest, or (b) an act of the king's enemies *e.g.*, seizure, or destruction of the goods by enemies, or (c) the inherent vice or defect in the goods themselves *e.g.*, bad packing or deterioration by evaporation or breakage¹. The position is correctly summarised by Lord Duredin in *London and North Western Ry Co. v. Richard Hudson and Sons Ltd.*,² in the following words—"That a common carrier is an insurer of goods entrusted to him for carriage and can only excuse himself on the ground of an act of God, or of inherent vice (in which expression I include bad packing) of the goods themselves is axiomatic."
- (2) A common carrier ceases to have the liability of an insurer after the goods arrive at their destination and he gives notice to the consignee of their arrival. If the consignee fails to take delivery of the goods or any part of them after such notice within a reasonable time, the carrier continues to have the liability of an ordinary bailee only in respect of the goods lying in his custody and will not be liable for any loss or damage unless the same is caused by his own negligence.³ The carrier

¹ *Hudson v. Baxendale*, (1857) 27 L.J. Ex. 93; *Nugent v. Smith* (1876) C.P.D. 423; *Gould v. S. E. & C. Ry.*, (1920) 2 K.B. 186; *Great Northern Ry. v. L. E. P. Transport and Depository*, (1922) 1 K.B. 742.

² (1920) A.C. 324 at p. 333.

³ *Mitchell v. Lancashire and Yorkshire Ry. Co.*, L.R. 10 Q.B.D. 256,

may also expressly agree to store the goods on their arrival at the destination in which case also the liability of the carrier will be that of an ordinary bailee only.¹

- (3) A common carrier may, by entering into special agreements with the consignor, exempt himself from liability for all loss and damage including those occasioned by his own negligence, or limit his liability to a particular kind or particular kinds of loss and damage. It is doubtful if a common carrier can, by a special agreement, relieve himself of liability for any loss caused by his own criminal act or that of his agents; for such an agreement would be void as against public policy or illegal. But the mere insertion of a general clause which exempts a carrier from liability for any loss of or damage to the goods entrusted to him will not exempt a carrier from liability for any loss or damage occasioned by his own negligence or that of his servants or agents unless such exemption is expressly provided for in plain, express and unambiguous terms by inserting in the special agreement something equivalent to what is known as the negligence clause. In England a special agreement limiting the liability of a carrier was provided for by carriers most frequently by inserting in newspapers, or distributing in hand-bills or, putting up in their offices a notice that they would not be liable for any property beyond a certain value, unless a special premium was paid for the insurance of the goods at the time of delivery. If this notice was brought to the knowledge of the consignor at the time the goods were delivered to the carrier, the consent of the consignor to the terms of the notice was implied and the carrier became entitled to the protection stipulated in the notice.² In order to avoid the strict common law liability of an insurer carriers were continually devising new types of agreements whereby they sought to reduce the liability of a carrier almost to nothing to the prejudice of the public.

¹ *Van Sall vs. S. E. Ry. Co.*, (1862) 31 L.J.C.P. 241

² *Price & Co. vs. Union Lighterage Co.*, (1904) 1 K.B. 412.

³ *Mayhew vs. Eames*, (1825) 3 L.J. (O.S.) K.B. 108; *Nicholson Willam*, (1804) 5 East 507.

The carriers Act of 1865 was, therefore, designed to relieve the strict liability of carriers as well as to restrict their powers to make one-sided special contracts.¹

Exceptions under the Carriers Act :

The carriers Act of 1865 affects the common law liability of a carrier as follows. For the purpose of defining the liabilities of a common carrier it divides articles which may be consigned into two categories, namely (1) the Scheduled articles and (2) the non-scheduled articles. The scheduled articles are those enumerated in the schedule to the Act and which are unusually valuable or unusually perishable,² i.e., gold, silver, jewellery, silk, paintings, engravings, title deeds, currency notes or coins, bills, hundis and etc. The non-scheduled articles are those which are not included in the schedule to the Act and which are of an ordinary kind e.g., wheat and rice and not unusually valuable or perishable.³

(1) As regards the scheduled articles the carriers Act, 1865 prescribes the liability of a common carrier as follows :—

(a) A common carrier is not liable for any loss of or damage to a scheduled article exceeding Rs. 100/- in value excepting when it is caused by a criminal act of the carrier, his servants, or agents, unless the value and description of the article is declared by the consignor or his duly authorised agent at the time when the goods are delivered to the carrier whether such loss or damage is caused by the negligence of the carrier or not.⁴ In *Narang Rai Agarwalla v. River Steam Navigation Co., Ltd.*⁵ the plaintiff sued the River Steam Navigation Co., Ltd., for the loss of a few bundles of Endi silk (which is a scheduled article), delivered to it at Gauhati for transmission to Calcutta via E. B. Ry. The amount of loss exceeded Rs. 100/- in value. It was held that the River Steam Navigation Co., was

¹ Vide Sir Henry Maine's speech before the India Council in introducing the Carriers Bill in the *Gazette of India*, supplt., 2-12-1864.

² Vide Sir Henry Maine's Speech, *Ibid.*

³ Vide Sir Henry Maine's Speech, *Ibid.*

⁴ Carriers Act, 1865, Ss. 3 & 8.

⁵ 11 C.W.N. 1071.

not liable for the loss as the plaintiff failed to declare the value and description of the goods at the time of delivery.

- (b) A common carrier is allowed to charge an additional rate for undertaking the increased risk of carrying a scheduled article provided a scale of charges containing the additional rate is publicly exhibited in his place of business in English as well as the vernacular language of the place¹.
- (c) A common carrier is liable for any loss of or damage to a scheduled article entrusted to him for carriage and is bound to return any sum which might have been paid as the charge for carriage, where the consignor or his agent has properly declared the value and description of the article and has paid or agreed to pay the increased rate, if any, and the carrier cannot limit his liability in this respect by any special agreement².
- (2) As regards non-scheduled articles, a common carrier may limit his liability for the loss of or damage to goods, entrusted to his care, by special contracts signed by the owner or his duly authorised agent excepting when such loss or damage is caused by the negligence or criminal act of the carrier or any of his agents or servants³. As Sir Lawrance Jenkins observed in *British and Foreign Marine Insurance Co., Ltd. v. India General Navigation and Railway Co., Ltd.*,⁴ "the liability of a common carrier for the loss of goods, not being of the description contained in the Schedule, may be limited by special contract signed by the owner, save when such loss shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants." It is clear that any special agreement which purports to exempt the carrier from liability for his own negligence or criminal act or that of his servants or agents is void

¹ Carriers Act, 1865, S. 4.

² *Ibid.*, Ss. 3 & 6; *British and Foreign Insurance Co. Ltd. v. India General Navigation and Ry. Co. Ltd.*, 38 Cal. 28 (42).

³ Carriers Act, Ss. 6 & 8.

⁴ 38 Cal. 28.

and inoperative as being illegal and in contravention of the carriers Act¹. In *India General Steam Navigation Co. v. Joy Kristo Saha*,² the defendant I. G. S. N. Co., received the goods of the plaintiff for carriage under conditions contained in a forwarding note signed by the plaintiff. One of such conditions stipulated that the defendants would not be liable in the case of loss or damage arising from certain kinds of accidents and also from the negligence of the defendants. The goods were lost as a result of the flat carrying the goods being sunk by collision with an underwater snag, the existence of which could not have been ascertained by any precautions on the part of the defendants. It was held that the defendants could limit their liability by special agreement as the goods were not of the scheduled class but not so as to relieve them of their liability for their own negligence and that the condition which purported to do so was, therefore, bad. On the facts, however, it was held that the defendants were not liable as the loss was due to one of the excepted conditions which were severable from the condition which was bad and not due to the negligence of the defendants.

Carriers Act, how far it modifies the Liability of a Common Carrier under the Common Law :

As regards scheduled articles whose value and description have been declared, the liability of a common carrier under the carriers Act, 1865 is absolute and higher than that under the common law for he cannot limit his liability by any special agreement, nor can he, it seems, claim protection under any of the common law exceptions e.g., an act of god or an act of the king's enemies. As regards scheduled articles whose value and description have not been declared the liability of a common carrier is much lighter than that under the common law for he is only liable if the loss or damage does not exceed Rs. 100/- in value or if the loss or damage is caused by his criminal act or that of his agents. It is not clear as to what the liability of a common carrier would be in the case

¹ Carriers Act, 1865, S. 8; *River Steam Navigation Co. Ltd. v. Aumunadas Ramkumar*, 59 Cal. 472 (474).

² 47 Cal. 39.

of loss or damage not exceeding Rs. 100/-, in respect of scheduled articles whose value and description have not been properly declared. It seems that the liability of the carriers would be absolute unless the articles are consigned as ordinary or non-scheduled articles under special agreements.

As regards non-scheduled articles the liability of a common carrier is the same as under the common law excepting that he cannot contract out of his liability for loss or damage caused by his negligence by any special agreement which is permissible under the common law

Presumption of Negligence :

Under the Carriers Act, 1865, a common carrier is liable absolutely for any loss or damage caused by his negligence excepting in the case of scheduled articles whose value and description have not been properly declared and, as we have seen, he cannot limit this liability by any special agreement¹. Where in a suit brought against a common carrier, the common carrier wants to relieve himself from liability for the loss or damage for which he is sued under any special agreement, it is for him to prove the absence of negligence². The burden of proof of absence of negligence is thus thrown on the common carrier on the principle that the loss or damage to the goods is *prima facie* proof of negligence and the Court must presume negligence in the absence of any proof to the contrary³.

Suits against a Common Carrier :

Any person who has an interest in the goods consigned and suffers loss of or damage to the goods can maintain a suit against the common carrier to whom the goods were entrusted for carriage whether he was a party to the contract of carriage or not or in the language of law whether there was privity between him and the carrier or not⁴. The reason is explained by the Privy Council in *Irrawady Flotilla Co. v. Bhagwandas*⁵, in the following words

¹ S 8 ; *I. G. S. N. Co. vs. Joy Kristo Saha*, 17 Cal. 39 ; *R. S. M. Co. Ltd vs. Jamunadas Ramkumar*, 59 Cal. 472.

² Carriers Act, 1865, S. 9.

³ *The River Steam Navigation Co. vs. Choutmull Doogur*, 26 Cal. 398.

⁴ *K. C. Dhar vs. Ahmed Bux*, 60 Cal. 879 at p. 889.

⁵ 18 I.A. 121 at p. 129.

—“The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. ‘A breach of this duty,’ says Dallas C. J. (*Betherton v. Wood*)¹ is a breach of the law, and, for this breach, an action lies founded on the common law, which action *wants not the aid of a contract* to support it.” Thus a consignee to whom the property in the goods has passed or a mortgagee of the goods or even an insurer who has paid the owner for the loss of the goods², can maintain an action against the carrier for loss or damage to the goods.

Requirement of notice :—No suit can be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff³. Notice to a local agent of the carrier is valid notice even though such local agent may also be the agent for another carrier⁴.

Limitation :—A suit against a carrier, which includes a common carrier, for compensation for loss of or injury to goods must be instituted within one year of the time when the loss or injury occurs and a suit for compensation for non-delivery of or delay in delivery of the goods must be instituted within one year of the time when the goods ought to be delivered⁵.

Private Carriers :

A private carrier has been defined by Avory J. in *Watkins v. Cottell*⁶ as one whose trade is not that of conveying goods from one person or place to another, but who undertakes upon occasion to convey the goods of another and receives reward for so doing. A private carrier differs from a common carrier in that he is

¹ (1821) 3 Brod. & B., 54.

² *British & Foreign Marine Insurance Co. Ltd. vs. I. G. N. & Ry. Co. Ltd.*, 38 Cal. 28.

³ *Carriers Act, 1865, S. 10 ; R. S. N. Co. Ltd. vs. Kashi Prosad*, 8 C.L.J. 192.

⁴ *India General Navigation & Ry. Co. vs. Girdharilal Gobardhan Das*, 54 Cal. 430.

⁵ *Limitation Act, Articles 30 & 31.*

⁶ (1816) 1 K.B. 10 at p. 14.

either one (a) who undertakes to carry for reward on occasions but not as a public employment or (b) one who, while inviting all and sundry to employ him as a carrier for reward, reserves the right to accept goods at his option¹.

Liability of a Private Carrier :

The liability of a private carrier is like that of a bailee. He is liable only for such loss or damage as is caused by his negligence *i.e.*, by his failure to take as much care of the goods entrusted to him as a man of ordinary prudence would, under similar circumstances, take of his own goods². But a private carrier is not liable if the owner keeps the goods under his control *e.g.*, when a passenger carries his own luggage, or if the loss is as likely to have arisen from the misconduct of the owner or his want of care, as from that of the carrier.

Gratuitous Carrier :

A person who undertakes to carry goods or passengers gratuitously *i.e.*, without reward, is called a gratuitous carrier. No action can be maintained against a gratuitous carrier for refusing to carry goods or passengers after he has undertaken to do so for the contract is *nudum actum i.e.*, unenforceable for want of consideration.³ But once a gratuitous carrier accepts goods for carriage he is in the position of a bailee and his liabilities become the same as that of a private carrier, *i.e.*, he will be liable for any loss or damage caused by his own negligence or that of his agents. As. Wills J. observed in *Sketton v. L. & N. W. Ry. Co.*⁴ "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly *but not if he neglects to perform it*. Such is the result of the decision in *Coggs v. Bernard*."

Carriers of Passengers :

Carriers of passengers may be either (a) a common carrier or (b) a private carrier or (c) a gratuitous carrier. The Carriers Act,

¹ *Belfast Ropework Co. vs. Rushell*, (1918) 1 K.B. 210.

² Contract Act, Ss. 151 & 152 ; *Coggs vs. Bernard* 1 Sm. L.C. 12th ed. 191.

³ *Whalley vs. Wray*, 3 Esp. 74.

⁴ *Coggs vs. Bernard*, *supra*.

⁵ L.R. 2 C.P., 636.

1865, does not affect their position as under the common law which still governs them. We shall discuss their position below.

Common carrier of passengers :—A person who is engaged in carrying passengers as a regular business and who holds himself out as ready to carry between places on a certain route all persons indifferently who accept his published terms is a common carrier of passengers¹. He is regarded as a common carrier because he is bound to carry any member of the public who wants to travel unless he can justify his refusal to do so under any one of the following common law exceptions, namely, (a) where the person offering himself to be carried is unfit or (b) where such person is unwilling to pay the stated fare or (c) where there is no accommodation. A bus company, or a tramway company which carries every one indiscriminately may be regarded as common carriers.

The liability of a common carrier of passengers is different to that of a common carrier of goods in that he does not stand in the position of an *insurer* for the safety of the passengers he carries. He does not warrant that the carriage in which the passengers travel is free from all defects likely to cause peril, although those defects may be such that no skill, care, or foresight could have detected their existence².

His duty is only to take due care and exercise due diligence in carrying the passengers and he will be held liable only in case of his negligence, *i.e.*, if injury is caused to a passenger by any defect which could have been detected by the exercise of reasonable care and diligence *e.g.*, where a passenger is injured by the tender of the train being thrown off the line as a result of a defect in the tyres of one of the wheels of the tender³. Thus Sir James Mansfield observed in *Christie v. Griggs*,⁴ "there is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that *as far as human care and foresight could go* he would provide for their safe conveyance."

The liability of a common carrier for passengers is the same

¹ Hari Rao's Indian Railways Act, p. 734.

² *Readhead vs. Midland Ry. Co.*, (1869) 4 Q.B. 379 at 389.

³ *Ford vs. London and South Western Ry. Co.*, 2 F. & F. 730.

⁴ 12 Camp. 79.

in relation to passengers who travel free or without ticket as that for passengers who travel with ticket provided the former does so with the knowledge and consent of the carrier.¹ But if a passenger travels free without the knowledge and consent of the carrier, he is regarded as a mere trespasser and the carrier is not liable for any injury caused to him whether by negligence of the carrier or not. In *G. N. Ry. Co. v Harrison*² a newspaper reporter held a free railway ticket in his own name. Another reporter, while travelling with the former's free ticket, was injured. The railway had knowledge of a practice whereby one reporter frequently travelled with another's ticket and had permitted the same. It was held that the injured reporter was entitled to recover damage for his injury as he was no trespasser, his irregular user of the railway having been permitted by the railway.

A common carrier of passengers is not liable for the injury caused to any passenger where the injury is caused as much by the negligence of the passenger as of the carrier³

Private Carrier of passengers :—A person who carries passengers for reward on occasions or who, while inviting all and sundry for the purpose of being carried, reserves the right to refuse to carry anyone at his option is to be deemed a private carrier of passengers⁴. His liability is the same as that of a common carrier of passengers.

Gratuitous carrier of passengers : A person who undertakes to carry anyone gratuitously *i.e.*, without reward is to be regarded a gratuitous carrier. He is not bound to carry anyone but once he does carry anyone he will be liable if an injury is caused to the latter by his negligence

Railways whether Common Carriers :

In India the railways stand on a different footing as compared to common carriers so far as their liabilities are concerned. Under

¹ *G. N. Ry. Co. vs. Harrison*, 23 L.J. Ex. 308 (310).

² *Supra*.

³ *Jehangir Muncherji vs. B. B. & Co. I. Ry. Co.*, 37 Bom. 575. In this case a passenger injured his arm by projecting it out of the window of a running train and colliding against the door of a stationery train which was kept open by the carrier negligently. It was held that the passenger was as much negligent by projecting his arm—as the carrier.

⁴ *Per Avory J. in Watkins vs. Cottel*, (1916) 1 K.B. 10 at 14.

S. 72 of the Railways Act, 1890, the liability of railways is defined to be that of a bailee as laid down in Ss. 151, 152 and 161 of the Contract Act and not that of an insurer as under the common law in respect of the loss, deterioration or destruction of goods and animals carried by them. But although a railway company is not a common carrier so far as its liability is concerned, yet it is regarded as a common carrier so far as its duties to the general public are concerned. Thus it cannot refuse to carry goods tendered to it without the justification recognised in common law¹ or make unreasonable delay in delivering the goods or refuse to deliver them without justification.² As Staples, A.C.J. observes in *Chhoglal vs. Secretary of State*³, "When once a railway company has held itself out to be a common carrier, it is under a common law liability to carry goods to all places to which it professes to carry and to accept all goods which are reasonably offered to it for conveyance to and from the places to which it professes to carry." A similar view was expressed by Walsh J. in *Sohan Pal vs. L. I. Ry. Co.*⁴ in the following words "A railway company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods".

Even as regards the liability of a railway company, a railway company has been held liable as a common carrier for any damage suffered by the owner of the goods which has been occasioned by reason of any breach of common law duty by the carrier excepting when such damage is caused by the loss, destruction or deterioration of the goods. The liability of a railway company is like that of a bailee only when such liability arises from the loss, destruction or deterioration of the goods or animals carried by it and not otherwise. Thus the liability of a railway for non-delivery of goods which have not been lost or damaged or for undue delay in delivering goods or for injury to the persons of passengers would not be governed by the Railway Act, 1890, but by the common law.⁵

¹ See *supra*.

² *Fazl Ellahi vs. E. I. Ry. Co.*, 43 All. 623.

³ A.I.R. (1933) Nag. 262 at p. 262.

⁴ 44 All. 218 at 227 (F.B.).

⁵ *East India Ry. Co. vs. Jogpat Singh*, 51 Cal. 615

Liability of Railways :

In India the liability of a railway administration for the loss, destruction or deterioration of animals or goods delivered to it for carriage is not like that of an insurer under the common law but like that of a bailee under Ss. 151, 152 and 161 of the Contract Act.¹ The duty of a railway administration is to take reasonable care only and it will be liable for the loss, destruction or deterioration of goods or animals entrusted to it in the following cases only :—

- (a) If the goods or animals are lost or damaged owing to the neglect of the railway or its servants to take such reasonable care as a man of ordinary prudence would, under similar circumstances, take of his own goods²
- (b) If the goods or animals are lost or damaged for any reason after the railway has made default in delivering the goods or animals at the proper time

But this general liability of a railway as a bailee is further limited in the following cases, namely (a) carriage of articles mentioned in the second schedule to the Railways Act, 1890, (b) carriage of animals, (c) carriage of passengers luggage and (d) carriage under special agreements known as *risk notes*.

- (a) *Carriage of Articles mentioned in the second schedule to the Act* — A railway administration is not liable for the loss, destruction or deterioration of any parcel or package, containing any article of special value mentioned in the second schedule to the Railways Act e.g., gold, silver, silk pearls, jewellery, watches, Government and other securities, paintings, engravings and etc., the value whereof exceeds Rs 100/- unless the person sending or delivering the same declares the value and contents thereof at the time of the delivery of the package or parcel to the railway for carriage and paid or agreed to pay an additional rate as insurance against the extra risk of carrying the same, if so required by the railway. If the consignor does not declare the value and contents of a package containing such article exceeding Rs 100/- in value or does not pay the

¹ Railways Act, 1890, S. 72(1).

² Contract Act, Ss. 151 & 152.

³ Ibid, S. 161.

additional rate when required by the railway, he cannot recover any loss or damage even though it may be caused by the negligence of the railway or its servants¹ Where such value and contents have been declared the railway is liable to pay upto the declared value if any loss or damage occurs, but the burden of proving the extent of the loss or damage is upon the person who claims compensation² A railway may, before accepting any parcel or package declared to contain such an article examine the contents of the parcel or package in order to ascertain that it really contains such an article¹ When a consignor sends any such article declared as such without paying the additional rate the practice of a railway is to take from the consignor an agreement in risk note Form called X or Y whereby the consignor agrees to absolve the railway of all liability in consideration of the articles being carried at the ordinary rate

A specimen form in which the consignor has to make a declaration as to the value and contents of a package containing such an article is given below —

FORM OF DECLARATION UNDER S 75

Declaration to be signed by the sender of excepted articles

The accompanying

weighing

address to

contains the articles detailed below of the aggregate value of Rs

(in words)

Rs As

Dated

19

Signature of Sender

Parcels or goods must be securely packed in a manner approved by the Station Master before they are accepted for despatch Articles packed in cloth should bear seals (at intervals not exceeding 3 inches along each line of sewing) showing distinct impressions of some device other than that of current coin

The Railway reserve the right to open packages containing excepted articles to ascertain that the articles are sound and in good condition All appliances in packing, etc, must be provided by the sender or receiver, who will see and be responsible that the packages are properly packed and repacked

¹ Railways Act, 1890, S. 75 (1).

² Ibid, S. 75 (2).

³ Ibid, S. 75 (3).

pensation for such loss or injury.¹ It should be noted, however, that the railway will be liable as a bailee only when such loss or injury results from the negligence or misconduct of the railways or its servants and if the animal dies or gets injured from its own inherent vice *e.g.*, where it jumps out of a truck and kills itself or kicks about and injures its legs.² But the onus of proving absence of negligence is on the railway where it is proved that the animal which dies or gets injured was fit and healthy at the time it was loaded in a truck.³

(c) *Carriage of Passengers' Luggages* :—A railway administration is not liable for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt therefor. This means that to hold a railway liable for the loss of a passenger's luggage the first requisite is that the passenger must have booked it and obtained a receipt thereof. But it does not follow that the railway is liable in every case of loss of or damage to a passenger's luggage. Its liability in this respect is also like that of a bailee and will arise only if the loss or damage is caused by its own negligence or misconduct or that of its servants.⁴ Thus if the passenger takes his luggage completely out of the control of the railway *e.g.*, by keeping it in his compartment and the luggage is lost by his own negligence the railway will not be liable for the loss.⁵

(d) *Carriage under special agreements or risk notes* :—A railway administration can limit its liability even as a bailee by entering into a special agreement with the consignor or his duly authorised agent. Such a special agreement, in order to be effective, must be in writing signed by or on behalf of the person sending or delivering the goods to the railway and must be in a form approved by the Governor-General in Council⁶. Special agree-

¹ *Ibid*, S. 73 (3).

² *Blower vs. G. W. Ry. Co.*, (1887) 4 T.L.R. 7.

³ *Smith vs. Midland Railway Co.*, 57 L.T. 813.

⁴ *Velyet Hussain vs. B. & N. W. Ry. Co.*, 13 C.W.N. 847.

⁵ *Jenkins vs. Southampton Steam Packet Co.*, (1919) 2 K.B. 135.

⁶ Railways Act, 1890, S. 72 (2) (a) & (b).

ments of this kind are known as risk notes and they purport to exempt the railway from even the liability of a bailee under certain conditions in consideration of the railway granting the consignor some concession in the shape of charging him a reduced rate of freight. There are several kinds of risk notes which have been approved by the Governor-General in Council and which are in current use, namely, risk notes A, B, C, D, E, F, G, H, X and Y. Risk notes C, X and Y exempt the railway from liability in every case of loss and damage, however caused. Risk notes A, B, D, G and H absolve the railway of liability for any loss or damage excepting where it is caused by the misconduct of the railway's servants. Risk notes E. and F limit the liability of the railway to specified sums agreed to as the maximum payable by the railway in respect of loss of or damage to certain classes of animals carried under the notes and relieve the railway of liability to pay even limited sums unless the loss or damage is caused by the negligence or misconduct of the railway company or that of their servants. We may study these risk notes in detail below .—

Risk note "A" :

When goods which are tendered to a Railway for carriage are either in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit the practice of the railway is to take an agreement from and signed by the person delivering in risk note form "A", the effect of which is to relieve the Railway of all liability for any condition in which the goods may be delivered to the consignee or for any loss or damage excepting when such loss or damage is caused by the misconduct of the Railway's servants. The form of Risk note "A" is given below :—

NEW RISK NOTE FORM A.

[Approved by the Governor-General in Council under section 72 (2) (b)
of the Indian Railways Act, IX of 1890]

(To be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit.)

STATION
193

Whereas the consignment of _____ tendered by _____ as
per Forwarding Order No _____ of _____ (date) for despatch
by the _____ Railway Administration to _____ station
under Railway Receipt No _____ of _____ (date) is in bad condition
and _____ liable to damage, leakage or wastage in transit as follows —

I _____
_____, the undersigned, do hereby agree and undertake to hold the said
We _____
Railway Administration over whose Railway the said goods may be carried
in transit from _____ station to _____ station harmless and
free from all responsibility for the condition in which the aforesaid goods
may be delivered to the consignee at destination and for any loss arising
from the same *except upon proof that such loss arose from misconduct on
the part of the Railway Administration's servants*

This agreement shall be deemed to be made separately with all Railway
Administrations or transport agents or other persons who shall be carriers
for any portion of the transit

| | | | |
|-------------|---------|---------------------|-----|
| WITNESS | | signature of sender | |
| (Signature) | Rank or | { Father's name | |
| (Residence) | | Caste | Age |
| WITNESS | | | |
| (Signature) | | Profession | |
| (Residence) | | Residence | |

It should be noted that though attestation by witness is provided for in risk note A, yet it is not essential¹ The onus of proving misconduct on the part of the Railways servants is on the person who claims compensation for any loss or damage² Misconduct is not negligence. It is some positive act or some wilful omission to do something which it is the duty of the Railway to do and is opposed to accident or negligence

RISK NOTE "B"

When a consignor sends goods or animals at a "special reduced or 'owner's risk rate' instead of an alternative "ordinary" or "risk

¹ Ardeshtir Bhikaji Tamboli v G I P. Ry Co, 52 Bom. 169 (174)

² M & S M Ry Co Ltd v Ravi Singh Deepsingh, A.I.R. (1935) Cal. 811 and 812.

³ Ralliram Dingra vs The Governor-General in Council, 48 C.W.N. 554

acceptance" rate, the practice of the Railway Administration to which the goods or animals are delivered for carriage is to accept the goods or animals under an agreement in risk note form B signed by the sender which exempts the Railway from all liability for any loss of or damage to the goods or animals excepting when such loss or damage is caused by the misconduct of the Railway's servants. The burden of proving misconduct of the Railway's servants in case of any loss or damage is on the person who claims compensation. But in the case of non-delivery, of the whole of a consignment or of the whole of one or more packages forming part of the consignment not due to fire or accident or in the case of pilferage from such package or packages, the Railway administration must in the first instance disclose how it dealt with the consignment and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct. If from such disclosure misconduct cannot be inferred the person claiming compensation must prove misconduct. The form of Risk Note "B" is given below —

NEW RISK NOTE FORM B :

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when the sender elects to despatch at a "special reduced" or "owner's risk" rate, articles or animals for which an alternative "ordinary" or "risk acceptance" rate is quoted in the Tariff.)

STATION.
193 .

Whereas the consignment of _____ tendered by _____ as per Forward
ing Order No _____ of _____ (date) for despatch by the
Railway Administration to _____ station, under Railway Receipt
No _____ of _____ (date) is charged at a special reduced rate
_____ instead of at the ordinary tariff rate chargeable for such consignment, —

the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants; provided that in the following cases :—

- (a) *Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, pro-*

tested otherwise than by paper or other packing readily movable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire ; .

- (b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a), where such pilferage is pointed out to the servants of the Railway Administration on or before delivery ;

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called, on to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall be upon the consignor.

This agreement shall be deemed to be made separately with all Railway Administration or transport agents or other persons who shall be carriers for any portion of the transit.

| | | | |
|-----------------|---------|---------------------|--------------------------------|
| WITNESS. | | Signature of sender | |
| (Signature) | | Father's Name | |
| (Residence) | Rank or | { | Caste Age |
| | | | |
| WITNESS. | | Profession | |
| (Signature) . . | | Residence | |
| (Residence) | | | |

(To be filled in by Booking Clerk.)

| | |
|------------------------|----------------|
| Description of packing | |
| Date | Booking Clerk. |

RISK NOTE "C"

When goods, which should normally be carried in covered wagons, carts or boats and which are liable to damage if not so carried, are accepted for carriage in open wagons, carts or boats at the sender's request, the Railway Administration to which the goods are tendered accept the goods to be so carried under an agreement in risk note form "C" signed by the sender which exempt the Railway from all liability, however caused, even though **no reduced rate** is charged by the railway in this case. But the Railway is exempted from liability only if the loss occurs during transit. If any loss occurs after the transit has terminated and the goods have reached their destination, the Railway will be liable as a bailee if the loss is occasioned by its negligence or misconduct or that of its servants. The form of Risk Note C is given below :—

RISK NOTE FORM C.

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when, at sender's request, open wagons, carts or boats are used for the conveyance of goods liable to damage, when so carried, and which, under other circumstances, would be carried in covered wagons, carts or boats)

STATION
193 .

Whereas the consignment of _____ tendered by _____ as
per Forwarding Order No _____ of _____ (date), for despatch by the
Railway Administration or their transport agents or carriers
to _____ station under Railway Receipts No _____ of _____
(date), is at _____ my request loaded in open wagons, carts or boats, to be
our

I
so carried to destination, _____ the undersigned do hereby agree and under
we
take to hold the said Railway Administration and all other Railway Ad-
ministrations working in connection therewith, and also all other transport
agents or carriers employed by them respectively, over whose Railways or
by or through whose transport agency or agencies the said goods may be
carried in transit from _____ station to _____ station
harmless and free from all responsibility for any destruction or deteriora-
tion of or damage to, the said consignment which may arise by reason of
the consignment being conveyed in open wagons, carts or boats during
transit over the said Railway or other Railways working in connection
therewith or during transit by any other transport agency or agencies
employed by them respectively

WITNESS
(Residence)

(Signature)

WITNESS
(Signature)
(Residence)

Signature of sender
Rank or { Father's name
Caste Age

Profession
(Residence)

RISK NOTE "D" :

When a sender consigns dangerous, explosive or combustible articles at a "special reduced" or 'owner's risk' rate instead of an alternative "ordinary" or "risk acceptance" rate quoted in the tariff, the Railway Administration to which the goods are tendered accept the same for carriage under an agreement in risk note form "D" which relieves the railway from all liability for any loss or damage excepting when such loss or damage is caused by the misconduct

of the railway or its servants. This risk note is very similar to risk note "B" in form. The form of risk Note D is given below :—

RISK NOTE FORM D :

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when the sender elects to despatch at a "special reduced" or "owner's risk" rate, dangerous explosive or combustible articles for which an alternative "ordinary" or "risk acceptance" rate is quoted in the Tariff)

STATION
193

Whereas the consignment of

tendered by —
us

as per Forwarding Order No. _____ of _____ (date) for
despatch by the _____ Railway Administration to
station, under Railway Receipt No. _____ of _____ (date) is charged
at a special reduced rate instead of at the ordinary tariff rate chargeable

I
for such consignments — the undersigned do in consideration of such
we

lower charge, agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the said consignment from any cause whatever, *except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants, provided that in the following cases —*

(a) *Non delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the rules and regulations for the time being in force for the packing of dangerous explosive or combustible articles where such non delivery is not due to accidents to trains or to fire,*

(b) *Pilferage from a package or packages forming part of the said consignment properly packed as in (a) when such pilferage is pointed out to the servants of the Railway Administration on or before delivery,*

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor

I
— further agree to accept responsibility for any consequences to the
we
property of the aforesaid Railway Administration, or to the property of other persons that may be in the course of conveyance, which may be

caused by the explosion of, or otherwise by, the said consignment, and that all risk and responsibility whether to the Railway Administration, to their servants or to others, remain solely and entirely with ^{me} —.

^{us}
This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit.

| | | |
|-------------|---------------------|--------------------|
| WITNESS. | Signature of sender | |
| (Signature) | Rank or | { Father's name .. |
| Residence | | { Caste Age .. |
| WITNESS. | | |
| (Signature) | Profession | |
| (Residence) | Residence | |

(To be filled up by Goods Clerk.)

Particulars of packing
 Date Goods Clerk.

RISK NOTE "E" :

An agreement in risk note form "E" signed by the consignor is used by a Railway administration when booking elephants or horses of a declared value exceeding Rs. 500/- a head, mules, camels or horned cattle Rs. 50/- a head, donkeys, sheep, goats, dogs or other animals Rs. 10/- a head, without the payment of the additional rate as authorised by S. 73 of the Railways Act. When animals are booked under this risk note the Railway is liable only upto the amounts fixed by S. 73 of the Railways Act, namely, Rs. 500/- a head for elephants or horses, Rs. 50/- a head for mules, camels, or horned cattle and Rs. 10/- a head for donkeys, sheep, goats, dogs and other animals, provided any loss or damage is caused by its negligence or that of its servants. The form of Risk Note E is given below :—

RISK NOTE FORM E :

[Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890.]

(To be used when booking elephants or horses of a declared value exceeding Rs. 500 a head, mules, camels or horned cattle Rs. 50 a head ; donkeys, sheep, goats, dogs or other animals Rs. 10 a head, without payment of the percentage on value authorized in section 73 of Act IX of 1890, as amended by section 4 of Act IX of 1896).

STATION.

....193 ..

I
 Whereas — the undersigned, have tendered to.. the Railway
 we

Administration for despatch to _____ station the animal (s)
 mentioned below, for which _____ have received Railway ticket No
 of this date ,

And whereas _____ have paid to the said Railway Administration only
 their ordinary freight charge without any extra charge for insurance ;

And whereas the said Railway Administration for such ordinary freight charges holds itself responsible for proved damages to (each of) the said animal (s) caused by neglect or misconduct of its servants to the extent of the value mentioned below ,

And whereas the said Railway Administration has notified that it will not be liable for damage or loss arising from fright or restiveness, or delay not caused by the negligence or misconduct of its servants, and such condition is accepted by _____

_____, the undersigned do in consideration of the foregoing terms and conditions hereby agree and undertake that the responsibility of the said Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose Railways, or by or through whose transport agency or agencies the said animal (s) may be carried in transit from _____ station to _____ station, for the loss, destruction or deterioration of, or damage to, (each of) the said animal (s) shall not exceed the value mentioned below —

| Animals | | | Animals | | |
|---------|---------------|---------------|---------|---------------|---------------|
| No. | Description | Value of each | No | Description | Value of each |
| | | Rs | | | Rs |
| | Elephants | 500 | | Donkeys | 10 |
| | Horses | 500 | | Sheep | 10 |
| | Mules | 50 | | Goats | 10 |
| | Camels | 50 | | Dogs | 10 |
| | Horned cattle | 50 | | Other animals | 10 |

WITNESS
 (Signature)

(Residence)

WITNESS.
 (Signature)

(Residence)

Signature of sender

Rank or } Father's name
 Caste Age

Profession

Residence

Note.—The words in *italics* should be scored out by the booking clerk when only one animal is sent.

RISK NOTE "F" :

When horses, mules and ponies are tendered for despatch in cattle truck or horse wagons instead of in horse boxes, the practice of a Railway Administration is to book them subject to an agreement in risk note Form "F" signed by the consignor which exempt the Railway from all liability in excess of Rs 50 - per head for any loss, destruction or deterioration of or damage to any such animal despatched under the note. But the Railway will not be liable even to pay for this limited liability unless the loss or damage is caused by negligence or misconduct or that of its servants. The reason for this limitation of liability is that the rate for carriage in cattle truck or horse wagons is lower than the horse box rate. The form of Risk note F is given below :—

RISK NOTE FORM F :

[Approved by the Governor General in Council under section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when booking horses, mules and ponies, tendered for despatch in cattle truck or horse wagons instead of in horse-boxes).

STATION
193

Whereas the consignment of

tendered by ^{me} —, as per Forwarding Order No. — of
^{us}

(date) for despatch by the — Railway Administration to
station, under Railway Receipt No. — of

(date) at ^{my} —, request and in consideration of the payment by ^{me} — of
^{our} ^{us}

cattle truck or horse wagon rate in lieu of horse box rate, loaded in cattle trucks or horse wagons instead of horse boxes to be so carried to destination,

And whereas the said Railway Administration has notified that it will not be liable for damage or loss arising from fright or restiveness, or delay not caused by the negligence or misconduct of its servants and such con-

^{me}
dition is accepted by —
^{us}

I
—, the undersigned do hereby agree and undertake to hold the said
^{we}

Railway Administration and all other Railway Administrations working in connection therewith, over whose Railways the said animal (s) may be carried in transit from — station to —
harmless and free from all responsibility in excess of Rs 50 (per head) for any loss, destruction or deterioration of, or damage to, the said consignment during transit over the said Railway or other Railways working in connection therewith

| | | | | |
|-------------|---------|----------------------|-----|--|
| WITNESS. | | Signature of sender. | | |
| (Signature) | Rank or | { Father's name | | |
| (Residence) | | Caste | Age | |
| WITNESS. | | Profession | | |
| (Signature) | | | | |
| (Residence) | | | | |
| | | Residence | | |

RISK NOTE "G" :

Risk note "G" is used as an alternative to Risk Note "D," when the sender desires to enter into a general agreement for a series of consignments instead of executing a separate Risk Note for each consignment. It is Risk Note "D" with slight alterations in the language so as to make it applicable to more than one consignment

RISK NOTE "H" :

Risk Note "H" is used as an alternative to Risk Note "B," when the sender desires to enter into a general agreement for a series of consignments instead of executing a separate risk note for each consignment. It is in fact Risk Note "A" with only such alterations as are necessary to make it applicable to more than one consignment

RISK NOTE "X" :

We have already seen that a Railway Administration is not liable for any loss of or damage to any article mentioned in the second schedule to the Railways Act, 1890, exceeding Rs 100 in value unless the consignor declares the value and contents of any consignment containing such an article and pays or undertakes to pay the additional rate, if required by the Railway Administration¹. Where the consignor declares the value and contents of such a consignment but does not pay or agree to pay the additional rate, the Railway accepts the consignment for carriage under an agreement in risk note Form "X," which relieves the Railway of all liability for any loss of or damage to the consignment, howsoever caused. The Railway need not take such a risk note, for even in the absence of a risk note, the Railway will not be liable for any loss or damage. But the Railway insists

¹ Railways Act, 1890, S. 75.

on it as a matter of practice. The form of risk Note "X" is given below :—

RISK NOTE FORM X :

(Approved by the Governor-General in Council Under Section 72(2) (b) of the Indian Railways Act, IX of 1890).

(To be used when the sender elects to despatch an "excepted" article or articles specified in the second schedule to the Indian Railways Act, IX of 1890, whose value exceeds one hundred rupees, without payment of the percentage on value authorised in section 75 of that Act)

Station
194

Whereas the Consignment of _____ tendered by _____ me
us
forwarding Order No _____ (date) for despatch by the _____
Administration or their transport agents or carriers to _____ Station,
under Railway Receipt No _____ of _____ (date), is charged at the
ordinary rates for carriage, and whereas I/we, have been required to pay,
and elected not to pay a percentage on the value of the consignment by
way of compensation for increased risk I/we, the undersigned do there-
fore agree and undertake to hold the said Railway Administration and all
other Railway Administrations working in connection therewith, and also
all other transport agents or carriers employed by them respectively over
whose Railways or by or through whose transport agency or agencies the
said goods may be carried in transit from _____ Station to _____
Station harmless and free from all responsibility for any loss destruction,
or deterioration of, or damage to the said consignment from any cause
whatever before during and after transit over the said Railway, or other
Railway lines working in connection therewith or by any other transport
agency or agencies employed by them respectively for the carriage of the
whole or any part of the said consignment

| | | | |
|-------------|--|---------------------|---------------|
| WITNESS | | Signature of sender | |
| (Signature) | | Rank or | Father's name |
| (Residence) | | | Caste |
| WITNESS | | | |
| (Signature) | | | Profession |
| (Residence) | | | Residence |

RISK NOTE "Y" :

Risk Note "Y" is used as an alternative to Risk Note "X," when the sender elects to enter into a general agreement for a term not exceeding six months for despatch of series of consignments containing excepted articles specified in the second schedule

to the Railways Act, 1890, exceeding Rs. 100/- in value without payment of the additional rate, instead of executing a separate risk note for each consignment. The form of Risk Note "Y" is the same as that of Risk Note "X" except certain minor alterations in the language in order to make it applicable to more than one consignment.

SUITS :

Notice under S. 77 of the Railways Act :—

No suit against a Railway Administration for the loss, destruction, or deterioration of animals or goods or for refund of overcharges in respect of animals or goods carried by the Railway can be instituted unless a previous notice in writing of such claim is given to the Railway Under S. 77 of the Indian Railways Act, 1890, within six months from the date of the delivery of the animals or goods for carriage.

*Persons entitled to sue :—*The person who can sue a Railway for any loss of or damage to goods or animals delivered to the Railway, is the person in whom the property in the goods or animals is vested. As Baron Parke puts it, "the person whose property the goods are is *prima facie* the party with whom the contract is made¹." Thus where the property in the goods still remains vested in the consignor after their delivery to the carrier, as where a vendor consigns the goods to the buyer reserving the right of disposal², the consignor is the only person who can sue. But where goods are delivered to a Railway by the seller for conveyance to the buyer and the receipt is made over to the buyer, the buyer alone, who is the consignee, can sue for any loss of or damage to the goods³. Similarly any person to whom the consignor has endorsed the railway receipt can institute a suit against the Railway for any loss or damage as he becomes entitled to the goods by virtue of such endorsement⁴.

Notice under S. 80 of the Civil Procedure Code :—

Where a Railway is a state Railway *i.e.*, administered by the

¹ Mullinson *vs.* Carver (1843) 1 L. T. (O. S.) 59;

² See Sale of Goods Act, *Supra*.

³ M. & S. M. Ry. Co. Ltd. *vs.* Rangaswami Chetti., A. I. R. (1924) Mad. 517.

⁴ *Prate Lal Gopi vs. E. I. Ry. Co.*, 46 All. 691.

Government of India, any suit against the Railway must be brought against the Governor-General in Council after serving a notice under S. 80 of the Civil Procedure Code, specifying the cause of action, the names and addresses of the parties to the suit, and the relief claimed at least two months prior to the institution of the suit besides serving a notice to the Railway under S. 77 of the Railways Act. In default of serving a notice under S. 80 of the Civil Procedure Code, the suit must fail.

Limitation —The period of limitation is the same as in the case of a suit against a common carrier.

Carriage by sea :

Contract of affreightment —A shipper who wants to ship goods by sea has to enter into a contract with a ship owner unless he possesses a ship himself. 'When a ship-owner agrees to carry goods by water or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him such a contract is called a *contract of affreightment* and the sum to be paid is called *freight*'.¹ A contract of affreightment may be (a) either contained in a document called a charterparty or (b) evidenced by a document called a *bill of lading*.

Charterparty :

When a ship owner agrees to carry a complete cargo of goods for a shipper, or to furnish a ship for that purpose the *contract of affreightment* is almost always set out in a formal document called a *charterparty*, which contains the terms and conditions under which the goods are shipped. A charterparty may either take the form of a lease or demise of the ship by the ship owner to the shipper for the purpose of carrying the goods, the shipper hiring the ship for such purpose or contain an undertaking by the ship-owner to carry the goods, the shipper undertaking to provide a full cargo. The shipper under a charterparty contract is called the charterer.

Where a charterparty contract takes the form of a demise or lease of the ship to the charterer, the charterer becomes for the

¹ Scrutton on Charterparties and Bills of lading, 12th ed. p. 1.

time being the owner of the vessel and the master and the crew become for all purposes his servants and through them the possession of the ship becomes vested in the charterer. A charterer by way of demise has, therefore, all the rights and is subject to all the liabilities of a shipowner. But where the charterparty is not by way of a demise, all that the charterer acquires is the right to use the ship for loading and carrying his goods and the ownership and the possession of the ship remains in the shipowner and the master and the crew continue to be the employees of the shipowner. It is difficult to determine whether a charterparty is by way of a demise or an ordinary one and the tendency of courts in recent times has been against construing a charter as a demise or lease.¹ The true test seems to be as observed by Lord Esher in *Bumvall v. Gilchrist & Co.*² whether the owner has for the time parted with "the whole possession and control of the ship." Thus where a charter stipulated that the ship was "to be let for the sole use of charterers and for their benefit for six months the owners supplying all ship's stores, and paying crew's wages," it was held that the charter was not a demise even though it uses the words "to be let etc." as the ship-owner did not part with the whole possession and control of the ship, having reserved the right to pay crew's wages³. But where a ship-owner purchased the ship for the purpose of selling it to the charterer on the terms that part of the purchase money would be paid at once and the balance on the expiration of the charter and where the charterparty provided that the ship was to be let to the charterer for four months, the charterer paying the wages of the captain and the crew it was held that the shipowner had parted with the possession and control of the ship and the charter was by way of a demise⁴.

A charterer may himself ship the cargo or enter into sub-contracts with separate shippers, who may ship cargo by the chartered ship under separate bills of lading.

¹ *Scrutton on Charterparties and Bills of Lading*, 12th ed. p. 5: per Vaughan Williams, L.J., in *Herne Bay Co. vs. Hutton*, (1903) 2 K.B. at p. 689.

² (1892) 1 Q. B. 253; (1893) A. C. 8.

³ *Omos Coal & Iron Co. vs. Huntley* (1877), 2 C. P. D. 464.

⁴ *Bumvall vs. Gilchrist & Co.*, (1893) A. C. 8.

Effect of a charterparty by way of a demise :

It has already been noted that a charterer by way of demise has all the rights and is subject to all the liabilities of a shipowner and he is to be regarded as the owner of the ship *pro tempore* (i.e., for the time being) during the continuance of the charter. The effects of such a charterparty may be enumerated as follows¹ :—

- (a) The shipowner, being out of possession, would have no lien at ^{cc} India, law on the goods shipped for the freight due ^{ter} as under the charter.
- (b) The shipowner of having ceased to be the owner, would not be liable to the shippers who ship goods through the charterer for any loss of or damage to the goods or for any acts of the master or the crew even if they did not know of the charter².
- (c) The master would be the agent of the charterer and delivery to him of goods bought by the charterer would deprive the unpaid seller of his right of *stoppage in transit* unless the bill of lading was made deliverable to the shipper or his order. Where the charter is not a demise, delivery to the master would be delivery to a carrier and the right of stoppage in transit would remain³.
- (d) A charterer by a demise would be regarded as a carrier within the meaning of the Carriage of Goods by Sea Act, 1925, and would be entitled to all the protection given there to a shipowner.⁴
- (e) A charterer by a demise would be entitled to the benefits conferred on an owner by Secs 502 and 503 of the Merchant Shipping Act, 1894.

Bills of Lading :

When the master or the owner of a ship has agreed with separate shippers to convey goods to the place of her destination, the ship is called a *general ship*. The contract of affreightment

¹ Scrutton on Charterparties and Bills of Lading, 12th ed., p. 6.

² *Baumvoll vs. Gichrest & Co.* (1893) A.C. 8

³ See the cases discussed on this point in the Chapter on *Sale of Goods*

⁴ Art. 1 (a) of the Schedule XX.

as to each parcel of goods shipped in a general ship may be contained in a charterparty but is more usually evidenced by a document called a *bill of lading*¹. "A bill of lading is in every case a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship²." A bill of lading, unlike a charterparty, is not the contract but only an excellent evidence of the terms of the contract³.

The issue of Bill of Lading : ^{to be the}

^{whether}
The contract of affreightment ^{in the} case of a bill of lading is usually concluded before the bill of lading is issued. The contract is concluded and the bill of lading is issued in the following manner. The voyage is first advertised, usually by means of shipping cards. Then prospective shippers book different spaces on the ship for their goods by means of a *freight engagement notes*. In most cases there is a concluded agreement between a shipper and the owner as soon as the shipper books a space, the shipper being deemed to have agreed to ship his goods and the shipowner being regarded as having agreed to carry the same on the terms of his usual bill of lading⁴. The shipper then delivers his goods to those who are in charge of the ship and is given in exchange a *mate's receipt* signed by one of the ship's officers or the ship's agent which shows that the goods have been delivered to the ship. The shipper then usually preserves three forms of bills of lading appropriate to the transaction and fills them up with the necessary details. These forms along with the mate's receipt are then taken to the shipowner who signs them and returns one of the signed bills of lading to the shipper, retaining the other two signed bills of lading and the mate's receipt for himself.

Form of Bill of Lading : —>

"The usual form of bill of lading is the '*shipped*' bill of lading, so called because it usually commences with the words

¹ Scrutton on Charterparties and Bills of Lading, 12th ed. p. 2.

² Ibid, p. 9.

³ Per Lord Bramwell in *Sewell v. Burdick* (1884), 10 A. C. 105.

⁴ *Smith's Mercantile Law*, 13th ed., p. 362; *De Clermont vs. General S. M. Co.* (1891) 7 T. L. R. 187.

'*shipped in apparent good order and condition*' or words to the like effect, and acknowledges the actual receipt of the goods on board a named ship¹."

But there is another form of bill of lading which simply acknowledges that goods have been received by the shipowner for shipment and does not admit whether the goods have been put on board a ship or not. These bills of lading are known as "*received for shipment*" bill of lading. Where the bill of lading is issued in India, the carrier, whether the shipowner or the charter as the case may be, must under S. 7 of the Carriage of Goods by Sea Act, 1925, issue a 'shipped' bill of lading if the shipper so demands. But if the shipper has previously taken a "received for shipment" bill of lading or a similar document of title he must surrender it when he takes a 'shipped' bill of lading. The carrier may, however, at his option note the fact of shipment and the name or names of the ship or ships upon which the goods have been shipped on a bill of lading already issued instead of issuing a fresh "shipped" bill of lading. It is not necessary to note on such noting the bill of lading already issued will be a 'shipped' bill of lading.

It was held in *Willy & Co. v. Carter* that a mere reference of a bill of lading by inserting a clause like "all goods" does not fix the shipper with knowledge of condition. The carrier, when signing the bill of lading as the agent, is expressly stated in the bill of lading to be in good order and condition as could have been ascertained by inspection.

4. Where the charterer is himself the shipper, the carrier is not liable for the goods unless he has received a bill of lading from the charterer.

Requirements under the Carriage of Goods by Sea Act :

Under the carriage of Goods by Sea Act, 1925, a bill of lading including a similar document of title issued in respect of cargo shipped from an Indian port must contain the following:—

(a) It must contain a clause paramount, *i.e.*, a statement

¹ Smith's Mercantile Law, 13th ed., p. 332.

² Article III, r. 3 (c) of the Schedule to the Carriage of Goods by Sea Act, 1925.

that it is to have effect subject to the rules laid down in the Act¹.

- (b) It must contain statements showing among others (i) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or in the cases of coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; (ii) the number of packages or pieces or the quantity or weight, as the case may be, as furnished in writing by the shipper; and (iii) the apparent order and condition of the goods; provided that no carrier, master or agent of the carrier, should be bound to state or show in the bill of lading any marks, number, quantity or weight which has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking².

bill of lading

Effects of a Bill of Lading are in charge of the ship and is given to the shipper. The effects of a bill of lading signed by one of the shipper are as follows:—

1. A bill of lading then usually preserves three bills of lading. The master within the bill of lading and fills them up. The ship is chartered under the bill of lading. These forms along with the mate's receipt shipper knew of the bill of lading to the shipowner who signs them and the shipper. The bill of lading is then given to the shipper, retained by the shipper, and the bill of lading is then given to the shipper, retained by the shipper, and the bill of lading is then given to the shipper, retained by the shipper. In *Sandeman v. Sewer*³, A, the shipowner chartered a ship to C, the charterer, to sail to X, and load from C's agent there. The charterparty provided that the master should sign bills of lading without prejudice to the charter (i.e., without conflicting with any provision of the charter). At X goods were shipped by shippers who knew nothing of the charter, under a bill of lading signed by the master. It was held that the shippers could sue A.

¹ Carriage of Goods by Sea Act, 1925, S. 4.

² *Ibid.*, r. 3, Art. III of the Schedule.

³ (1886), L.R. 2 Q.B. 86.

the master having signed as his agent. Similarly the shipowner will not be able to rely on any restriction on the authority of the master to sign a bill of lading in a particular form imposed under a charterparty which otherwise would be within the ordinary authority of the master unless the shipper knew of the terms of the charter¹.

2. Where a bill of lading is issued to a shipper, other than the charterer, who ships goods on a ship which is chartered by way of a demise, the charterer alone is liable for any loss or damage to the goods covered by the bill of lading whether the shipper knew of the charter or not².

3. Where a shipper has notice that the ship is chartered and that under the charter the master is the agent of the charterer in signing bills of lading, the shipper can sue the charterer only for any loss or damage even if the charter does not amount to a demise. In *Samuel v. West Hartlepool Steam Navigation Co.*³ a shipper shipped oil in a chartered ship under a bill of lading, the contract providing that the charterer's form of bill of lading was to be used. The bill of lading was in fact signed by the master on the charterer's form. It was held that the shipper could not sue the shipowner as his contract was with the charterer. But it was held in *Manchester Trust v. Furness, Wilby & Co.*⁴ that a mere reference of a charterparty in a bill of lading by inserting a clause like "all other conditions as per charter" does not fix the shipper with knowledge that the master was signing the bill of lading as the agent of the charter unless it is expressly stated in the bill of lading or a copy of the charter is annexed to the bill of lading⁵.

4. Where the charterer is himself the shipper, the bill of lading is to be regarded as merely a receipt for the goods and cannot vary the terms of the charter unless the parties expressly and clearly intend to effect such variation. As Lord Bramwell observed in *Wagstaff v. Anderson*⁶, "to say that the bill of lading is a contract, superseding, adding to, or varying the former con-

¹ Scrutton on Charterparties and Bills of Lading—12th Ed., 59.

² *Baumvoll vs. Gilchrest*, (1893) A.C. 8.

³ (1906), 11 Com. Cas. 115.

⁴ (1895) 2 Q.B. 539 (C.A.)

⁵ *The Draupner* (1910) A.C. 450.

⁶ (1880), 5 C.P.D. at p. 177.

tract, is a proposition to which I can never consent." If the holder of a bill of lading is an agent of the charterer the effect of the bill of lading would be the same¹. In *Rodocanachi v. Milburn*² the master of a chartered ship was authorised, under the charter, to "sign bills of lading, at any rate of freight, and as customary at port of lading, without prejudice to the stipulations of the charter." The charterer shipped goods under the charter and the master signed a bill of lading containing a stipulation that the shipowners would not be liable for "the negligence of the master and the crew" which was not in the charter. The goods were lost through the negligence of the master. It was held that the master could not insert a clause in the bill of lading to the prejudice of the charter and the bill of lading was merely a receipt and the shipowners were liable.

5. Where a bill of lading, issued to a charterer who is also the shipper, is transferred to a bonafide transferee for value without notice of the terms of the charterparty the shipowner cannot rely on the charterparty as against such transferee and is bound by the terms of the bill of lading. The position would be the same as against a shipper or an endorsee from him who takes a bill of lading in ignorance of the terms of a charterparty. In the *Patria*³ a ship was chartered to C under a charterparty which relieved the shipowner of liability for certain excepted perils including "restraint of princes." F shipped goods to G in ignorance of the charter and the master signed a bill of lading containing only an exception of "perils of the Sea". The goods were lost for "restraint of princes." In an action by G, who was also ignorant of the charter, against the shipowner, it was held that the shipowner was liable as the bill of lading did not contain an exception of "restraint of princes" and that the bill of lading was not affected by the terms of the charter of which both F and G were ignorant.

The effects of a bill of lading whether issued under a charterparty or not are as follows :—

1. A bill of lading signed by the master within the terms of his authority is *prima facie* evidence against the carrier (*i.e.*,

¹ *San Roman* (1872), L.R. 3 A. & E. 583, 592.

² (1886), 18 Q.B.D. 67.

³ (1871), L.R. 3 A. & E. 436.

the shipowner or the charterer, where the charter is a demise or the bill of lading is signed by the master as the agent of the charterer to the knowledge of the shipper) that the quantity or weight of the goods stated therein has been delivered on the ship¹. If the carrier cannot deliver the full quantity he will be liable for any deficiency unless he can prove that the quantity stated in the bill is incorrect.² Under the Carriage of Goods by Sea Act, 1925³, a bill of lading must show the number of packages or prices or the quantity or the weight and the apparent order and condition of the goods which are *prima facie* evidence against the carrier. The carrier will be liable for any deficiency in the weight or quantity or packages and the condition of the goods as stated unless he can show that the statement in the bill of lading relating to these was incorrect.

2. If a bill of lading is transferred to a bonafide transferee for value, the statements in the bill of lading are *conclusive* evidence against the carrier even if the goods have not in fact been shipped or the statements as to their quality, quantity or weight are incorrect and the carrier will be liable to the transferee for non-delivery or deficiency in the quality or quantity or weight of the goods as stated in the bill of lading⁴. But the carrier will not be liable even to a transferee for value if the bill was obtained by misrepresentation or fraud of the holder of the bill or the shipper or some person under whom the holder claims or if the holder knew at the time of the transfer of the bill to him that the statements in the bill were incorrect⁵.

3. In the case of a bill of lading issued in India, the shipper is deemed to guarantee the accuracy of the statements furnished by him *e.g.*, as regards the quality or quantity of the goods and incorporated in a bill of lading and is bound to indemnify the carrier for any loss, damage or expenses arising from any inaccuracy in such statement *e.g.*, when the carrier becomes liable to a bonafide transferee for value⁶.

4. Where any particular weight of a bulk cargo is accepted

¹ Carriage of Goods by Sea Act, 1925, r. 4 Art. III of the Schedule.

² *Smith vs. Bedouin S. N. Co.* (1896) A.C. 70.

³ R. 2, Art. III of the Schedule.

⁴ *Brown vs. Powell Coal Co.* (1875), L.R. 10 C.P. 562.

⁵ *Valeri vs. Boyland* (1866) L.R. 1 C.P. 382.

⁶ Carriage of Goods by Sea Act, 1925, r. 5, Art. III of the Schedule.

by a third party other than the carrier and is incorporated as such in a bill of lading issued in India, such weight as stated in the bill of lading will not be *prima facie* evidence against the carrier and the shipper will not also be deemed to guarantee the accuracy thereof and the carrier will not be liable for any deficiency in the weight even to a transferee of the bill of lading for value.

Bill of Lading a document of title-functions :

A bill of lading has been defined as a document of title in the Sale of Goods Act¹. Its function is twofold, namely, (a) it serves as an evidence of the contract between the shipper and the carrier and (b) it serves as a symbol of the goods shipped. In the latter capacity it is regarded as a document of title in the sense that a transfer of the bill of lading is regarded as a symbolical transfer of such property in the goods in favour of the transferee as it was the intention of the parties to transfer². The transferor may intend (a) to transfer absolutely the property in the goods or (b) to pass the property conditionally as on the acceptance of bills of exchange for the price or (c) to effect a mortgage of the goods as security for an advance or (d) to effect a pledge of the goods for the same purpose or (e) to pass no property at all in the goods as when no consideration is paid for the transfer.³

The function of a bill of lading as a document of title is most ably summarised by Bowen L. J. in *Sarders vs. Maclean*⁴ in the following words :—

“A cargo at sea, while at the hands of the carrier, is generally incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol ; and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties, that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the

¹ S. 2 (4).

² *Sewell vs. Burdick* (1884), 10 A.C. 74.

³ *Scrutton on Charterparties and Bills of Lading*, 12th Ed. pp. 190, 191.

⁴ (1883), 11 Q.B.D. 327 at p. 341.

indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner.¹ It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

Transfer of Bill of Lading :

A bill of lading making goods deliverable "to order" or "to order or assigns" of the consignee or "to order" or "to order or assigns" of a blank name is by mercantile custom negotiable by indorsement and delivery and a bill of lading making goods deliverable to bearer is similarly negotiable by mere delivery.² But a bill of lading, which makes goods deliverable to a specified person and does not show on the face of it that it is transferable *eg.* where it does not show that the goods are deliverable to the "order or assigns" of the consignee or of a blank name, is not negotiable.³ Indorsement may be effected by the shipper on the consignee writing his name on the back of the bill. The indorsement may be "in full" or special *i.e.*, in favour of a specified person in which case the indorsee transfers it again only by reindorsing it.⁴ The indorsement may, however, be "in blank" in which case the bill of lading may be transferred again by mere delivery.⁵

Bills of Lading if Negotiable Instruments :

Although a bill of lading, which makes goods deliverable to order" or "to order or assigns" of a named person or a name left blank or "to bearer", is negotiable by indorsement and delivery or delivery only as the case may be, and property in the goods may pass if that was the intention of the parties to the transfer, yet such a bill of lading cannot be regarded as a negotiable instrument.

¹ Bills of Lading Act, 1855, S. 1.

² Scrutton on Charterparty and Bills of Lading, 12th Ed. p. 187.

³ Henderson *vs.* Comptoir d'Escompte de Paris (1873), 4 L. R. 5 p.c. 253 at 259.

⁴ Lickbarrow *vs.* Mason (1794), 5 T.R. 683.

⁵ Per Lord Selbourne in Sewell *vs.* Burdick (1884), 10 A.C. 74 at p. 83.

The characteristic feature of a negotiable instrument is that a holder in due course acquires a valid title to the instrument, even as against the true owner, irrespective of any defect in the title of his transferor in all cases excepting when he derives his title through a forged indorsement.¹ But the holder of a bill of lading takes the bill subject to any defect in the title of his transferor or any person from whom his transferor derives his title whether he is a holder for value without notice of such defects or not². The difference between a negotiable instrument and a bill of lading is, therefore, that in the former case a holder in due course takes a better title than his transferor, where in the latter case the holder takes only such title as his transferor possesses. Thus where A ships goods to C and sends the bill of lading to C along with a bill of exchange for the price on the condition that C can take the bill of lading on accepting the bill of exchange, the intention of the parties is that the property in the goods will only pass on C's acceptance of the bill of exchange.³ If C takes the bill of lading wrongfully without accepting the bill of exchange and indorses it in favour of D who takes it bonafide and for value, D will have no title to the goods as against A, though he was not aware of the defect in C's title. A bill of lading is, therefore, negotiable only in a popular sense and not in a technical sense⁴.

But in the following cases a bonafide transferee for value without notice acquires a better title than his transferor even in the case of a bill of lading :—

- (a) Where an unpaid vendor has parted with the property in the goods absolutely and has handed over the bill of lading to the consignee, a bonafide indorsee for value from the consignee of the bill of lading would take the goods free of the right of the vendor to stop the goods in transit.⁵
- (b) Where a bill of lading issued under a charterparty by the shipowner to the shipper whether the charterer or not, differs in its terms from the charter, the shipper,

¹ S. 58 of the Negotiable Instruments Act ; also see the chapter on Negotiable Instruments.

² *Curney vs. Behrend* (1854), 3 E. & B. at pp. 633, 634.

³ Sale of Goods Act, S. 25;

⁴ *Scrutton on Charterparties and Bills of Lading*, 12th ed. p. 188.

⁵ *Scrutton on Charterparties and Bills of Lading*, 12th ed. p. 210.

if he is the charterer or is aware of the charter; is bound by the terms of the charter. But if the bill of lading is transferred by the charterer or the shipper, who is aware of the charter, to a bonafide holder for value who takes it ignorant of the terms of the charter, such transferee will take the bill unaffected by the terms of the charter even though the agent of the shipowner who signed the bill of lading had no authority to sign it provided it was within the ordinary authority of the agent and the difference in the terms of the bill of lading was not obtained by fraud of any previous holder¹ Thus if any clause contained in the charterparty limiting the liability of the shipowner is not incorporated in the bill of lading, a bonafide indorsee for value of the bill of lading would take it free from the operation of such clause limiting the liability and can sue the shipowner for any loss or damage which is not excepted in the bill of lading, though it might have been so in the charterparty.²

- (c) Where a mercantile agent is, *with the consent of the owner*, in possession of the bill of lading in respect of the shipment of those goods, an indorsee or transferee for value of the bill of lading from him whether by way of sale, mortgage or pledge would acquire a valid title of the goods as against the true owner, provided the indorsee or transferee acts in good faith and has not noticed that the agent has no right to transfer the bill of lading.³
- (d) Where a person, having sold goods, continues in possession of the bill of lading in respect of the goods, a transfer of the bill of lading by him or his mercantile agent whether by sale, mortgage or pledge, would confer a valid title in respect of the goods to any transferee for value who takes the bill in good faith and without notice of the previous sale.⁴

¹ Mitchell *vs.* Scaife (1815), 4 Camp. 298.

² The Patria (1871) L.R. 3 A. & E. 436; Chappel *vs.* Comfort (1861), 10 C. B. N. S. 802; Manchester Trust *vs.* Furness (1895) 2 Q. B. 539; Turner *vs.* Haji Goolam (1904) A. C. 826.

³ Sale of Goods Act, S. 27; Contract Act, S. 178.

⁴ Sale of Goods Act, S. 30 (1);

- (c) Where a person, having bought or agreed to buy goods, obtains, *with the consent of the seller*, possession of the bill of lading in respect of the goods before he becomes the owner of the goods, as when a purchaser under a hire purchase agreement obtains the bill of lading before any instalment of the price has been paid, a transfer of the bill of lading whether by way of sale, mortgage or pledge would pass a valid title to the transferee as against the original seller provided the transferee takes the bill for value and in good faith and without notice of any lien or other right of the original seller.¹

Warranties and Terms :

A contract of affreightment, whether contained in a charterparty or evidenced by a bill of lading, contains statements, which are either of facts as then existing *e.g.* the then position or condition of the ship or are promises for the future *e.g.* that the ship will be ready to load by a given day. Statements as to promises for the future are usually to be found in a charterparty and are absent in a bill of lading; for a bill of lading is issued after the goods have been shipped or delivered for being shipped whereas the process of shipping and loading in the case of a charterparty takes place after the signing of the charterparty. The statements in a contract of affreightment are either warranties or terms. A warranty in a maritime contract as in a marine insurance contract denotes a term which is usually called a "condition" and which is so essential to the contract that its non fulfilment entitles the party relying thereon to repudiate the contract. "It is either an affirmation or promise of the existence of some fact or facts upon the non-existence of which the contract ceases to exist"² A term, on the other hand, means any affirmation or promise which is not so vital as to make the contract dependent upon its truth. It corresponds to a warranty in an ordinary contract and its breach only gives rise to a right for damages to the aggrieved party. Whether a term in contract of affreightment is a warranty or a term is to be determined by the court from the intention of the parties to be gathered from all the surrounding circumstances.³ In *Suger vs.*

¹ *Ibid*, S. 30 (2).

² *Commercial Laws of the World*, Vol. XIII, p. 520.

³ *Behu vs. Burness* (1863), 3 B. & 751.

ber, or Charterers to have the option of cancelling the agreement. Duthue¹ a ship was chartered to be ready on or before 10th November. It was held that such readiness was a condition precedent or warranty, the breach of which would entitle the charterer to cancel the agreement. The same charter also contained a clause that the Captain should attend daily at the broker's office to sign bills of lading. It was held that such a daily attendance was only a term and not a warranty.

A party entitled to repudiate a contract of affreightment for breach of warranty may waive it and treat it as a mere term and sue for damages for its breach. In the case of a bill of lading disputes occur very rarely as to whether a term is a warranty or not because the shipper can hardly discover a breach of warranty before the ship has sailed and has no opportunity of taking his goods back and the shipper has to seek his remedy by way of damages in case of any breach of warranty.

Warranties may be either express or implied by law.

Implied Warranties :

The following warranties are implied in every contract of affreightment unless they are excluded by clear and unambiguous words —

- (1) *Warranty of Seaworthiness* — A carrier by contracting to carry goods in a ship impliedly warrants that his ship is seaworthy for the purpose of the particular voyage, that is, she is fit in all respects to carry her cargo safely to its destination, having regard to all the ordinary perils to which such a cargo would be exposed on such a voyage². The seaworthiness must exist not only at the commencement of loading but also at the time of sailing from the port of loading³.

In *Cohen vs Davidson*,⁴ a ship was chartered to proceed to a

¹ (1860) 8 CBNS 45.

² *Rathbone vs McIver*, (1903) 2 KB 378, *Elderslie vs Borthwick*, (1905) A C 93, *Nelson vs Nelson*, (1908) A C 16, *Chartered Bank vs B I S N Co.*, (1909) A C at p 375.

³ *Steele vs State Line Steamship Co.* (1877), 3 A C 72.

⁴ *Hedley vs Pinkney S S Co.*, (1894) A C. at p 227; *Maop' King vs. Hughes* (1895) 2 Q. B. 550.

⁵ *Scrutton on Charterparties*, 12th ed. p. 99.

⁶ (1877) 2 Q.B.D. 455.

a wharf in a river and there take on board a cargo and sail for another port. It was found that the ship was seaworthy when she began to load but unseaworthy when she put to sea. It was held that the shipowner was guilty of breach of warranty for sailing to make the ship seaworthy at the time she put to sea after loading.

There is no fixed standard for determining seaworthiness. Seaworthiness is a relative term and varies according to the nature of the voyage and the cargo to be carried. Thus a ship may be seaworthy for a voyage in home waters but unseaworthy for a voyage across the Atlantic¹ or for a voyage at one season of the year and not for a voyage at another season. Similarly a ship carrying wheat may be seaworthy without a refrigerating machinery or one which is out of order but a ship carrying frozen meat must have a refrigerating machinery in order before it sails in order to be seaworthy. Thus in *Maori King v. Hughes*,² where frozen meat carried by a ship was damaged by a breakdown of the refrigerating machinery due to a defect which existed when the voyage started it was held that the warranty of seaworthiness was broken and the shipper was entitled to recover damage from the shipowner, though the bill of lading provided that the steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery. If, however, the defect due to which the machinery broke down arose after the voyage had started the shipowner would not have been liable as the damage would have come under the exception. In this case the exception did not expressly limit the liability of the shipowner for unseaworthiness at the start and hence he was held liable. Similarly in *Stanton v. Richardson*,³ it was held that the charterer was entitled to cancel the charterparty where it was found that the chartered ship was seaworthy to carry any cargo except wet sugar which was the cargo to be carried under the charterparty and for which the ship had not pumps of sufficient capacity.

Where a voyage is to be performed in different stages, during which the ship requires different kinds of, or further, preparation or equipment, there is an implied warranty that at the commencement

¹ *Smith's Mercantile Law*, 13th ed., p. 340.

² (1895) Q.B. 550.

³ (1875), L.R. 9 C.P. 390.

ment of each stage the ship is seaworthy in respect of her preparation or equipment for the purposes of that stage. Thus where a voyage includes a stay in a port of loading, sailing down a river to the open sea and then an open sea voyage, there are three stages in the voyage and at the commencement of each of the three stages she should be seaworthy for the purposes of that particular stage. Thus while sailing down the river, it will be enough for her to sail with a river crew and without the heavy equipment necessary for a sea voyage. But while taking to the sea she must have a seagoing crew and the heavy equipment necessary for a sea voyage in order to be seaworthy.¹

Where the undertaking as to seaworthiness is broken and the shipper discovers it before the voyage begins he can treat the contract as repudiated by the shipowner and refuse to load his goods. But if he discovers the breach subsequently he can recover any loss sustained by him by reason of the unseaworthiness. Under the common law a shipowner is absolutely liable for any loss caused by unseaworthiness at the starting of the voyage even where the unseaworthiness would not be discovered with all the care and diligence unless he is expressly protected from such liability by exceptions in the charter or the bill of lading. But under the Carriage of Goods by Sea Act, 1925¹ the undertaking of the shipowner is only to exercise due diligence to make the ship seaworthy where goods are shipped under a bill of lading whether under a charterparty or not. The shipowner is not, therefore, liable in cases of shipments under bills of lading issued in India for any unseaworthiness which could not be discovered by due diligence or care. But under the carriage of goods by Sea Act, 1925,¹ the shipowner cannot, by any express provision in a bill of lading, relieve himself of his liability for any loss caused by his neglect or default in exercising due diligence to make the ship seaworthy which he is still permitted to do under the common law where goods are shipped under a charterparty.⁴

(2) *Implied warranty of reasonable despatch*.—In every contract of affreightment the carrier impliedly undertakes that the

¹ *Mcfadden vs Blue Star Line* (1905) 1 K. B. 697, *Wade vs. Cocker line* (1905), 10 Com. Cas. 115, *Rid & Co vs Page, Son & East*, (1927) 1 K. B. 743,

² *Bank of Australia vs Chan Line* (1916) 1 K. B. 39,

³ Art. II, r. 1.

⁴ Art. II, 48

ship "shall be ready to commence the voyage agreed on, and to load the cargo to be carried, and shall proceed upon and complete the voyage agreed upon, with all reasonable dispatch".¹ A breach of this undertaking may amount to a repudiation of the contract or may give the shipper only the right to recover damages for any loss which he may have suffered due to delay.

Thus if by a breach of this undertaking there is such delay as goes to the root of the whole matter, and deprives the charterer or the shipper of the whole benefit of the contract or entirely frustrates the object of the charterer or the shipper in shipping the goods, the charterer or shipper may refuse to ship or load the goods.² But if the delay is not so serious as to discharge the contract, the charterer or the shipper cannot refuse to load, but the carrier will be liable for damages unless the delay is due to some cause for which the carrier is not liable under the excepted clause in the contract of affreightment. In *Mac Andrew vs. Chapple*,³ a ship was chartered "with all convenient speed, having liberty to take an outward cargo for owner's benefit, direct on the way, to proceed to a named port, and there load a full cargo" The ship deviated to another port which was not "direct on the way" to the named port and arrived at the named port a few days late. The charterers, thereupon, refused to load. It was held that the charterer was not entitled to refuse to load as the object of the voyage was not frustrated, but could recover damages for the delay.

In some cases the circumstances which cause the delay may render the performance of the contract impossible and bring about what is called in the language of maritime contract "frustration of the commercial purpose of the adventure." This happens where the ship is requisitioned by the Government before the voyage starts⁴ or where the ship is detained at the port of loading by an order of the Government as a result of war⁵ or where the ship cannot sail due to blockade or where the ship is lost due to no fault of the carrier and so on. Where the contract becomes

¹ Scrutton on Charterparties and Bills of Lading, 12th ed. p. 107.

² *Mac Andrew vs. Chapple* (1866) L. R. 1 C. P. 643; *Freeman vs. Taylor* (1831), 8 Bing 124.

³ *Ibid.*

⁴ *Bank Line vs. Capel* (1919) A.C. 435.

⁵ *Scottish Navigation Co. vs. Souter* (1917) 1 K.B. 222.

impossible of performance, the rights and obligations of both parties come to an end excepting that any party who has received any benefit under the contract, is bound to restore it to the other party under the Indian Contract Act.¹

(3) *Implied warranty against deviation* :—In the absence of any express stipulation, the shipowner under a contract of affreightment, impliedly undertakes to proceed in the ship without unnecessary deviation from the proper route of the voyage.² Where the route is fixed by the contract, the route so fixed is the proper route. Where no route is fixed by the contract, the usual and customary route from the port of loading to the port of discharge could be the proper route³ and this need not necessarily be the shortest route.

Express stipulations authorising deviation are usually inserted in a charterparty or a bill of lading e.g., the ship may have “liberty to call at any ports in any order to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property”. A clause giving the ship “liberty to call at any ports in any order” is, however, construed strictly and allows the shipowners to call at such ports only as are in the ordinary course of the named voyage. Any clause giving the ship liberty to deviate is always construed with reference to the commercial object of the voyage and however wide the clause may be, it will not justify any deviation inconsistent with the main object of the voyage.⁴

Deviation may also be justified under the common law in the following cases :—

- (a) Where the ship deviates to save human life, as from a wrecked or torpedoed ship lying outside the ordinary route, but not for the purpose of saving property apart from agreement.⁵
- (b) Where the ship deviates in order to avoid some imminent peril, as by hostile capture, pirates, icebergs, or other dangers of navigation.⁶

¹ S. 65; See the rights of parties in case of discharge by supervening impossibility.

² *Leduc vs. Ward* (1888), 20 Q.B.D. 475.

³ *Ibid*, Per Lord Esler, M.R. at p. 481.

⁴ *Glynn vs. Marketson*, (1893) A.C. 351.

⁵ *Searamanga vs. Stamp*, (1880), 5 C.P.D. 295.

⁶ *The Teutonia*, (1872). L.R. 4 P.C. 171.

(c) Where the ship deviates for repairing damage to the ship or the cargo.¹

Unreasonable delay may amount to deviation as much as a departure from the usual route. Thus taking a ship in tow "has been held to be equivalent to a deviation, and rightly so, seeing that the effect is necessarily to retard the progress of the towing vessel, and thereby to prolong the risk of the voyage."²

The effect of unjustified deviation is to take away from the shipowner the protection given by the "excepted points" clause in a charterparty or a bill of lading and to annul the exceptions in the contract. The shipowner will, therefore, be liable to the charterer or the shipper as the case may be for any loss or damage which the goods sustain, unless he can show that (a) the loss or damage is caused by any of the common law exceptions, namely, the act of God or by the King's enemies, or by inherent vice of the goods and (b) that the loss or damage by one of these excepted causes was not, and could not have been occasioned by the deviation.³ Practically the shipowner can hardly prove the second proposition except where the loss or damage is due to the inherent vice of the goods.

(4) *Implied warranty by shipper not to ship dangerous goods without notice*:—In every contract of affreightment there is an implied warranty by the shipper that the goods he ships are not dangerous or so packed that they may be dangerous. If he ships such goods he will be liable to any person who is injured by the shipment of such dangerous goods excepting where the shipowner had notice of the dangerous character of the goods or ought to have known such dangerous character or had full opportunity of observing such dangerous character.⁴ In such a case it will be no defence that the shipper took all reasonable care to pack the goods. In *Brass vs. Maitland*⁵ a shipper shipped sixty casks described as "bleaching powder" apparently sufficiently packed. The powder contained chloride of lime, which corroded the casks, and damaged the rest of the cargo. It was held that in the absence

¹ *Phelps, James & Co. vs. Hill*, (1891) 1 Q.B. 605.

² *Per Cockburn C. J.* in *Searamanga vs. Stamp* (1880) 5 C.P.D. at p. 299.

³ *Morrison vs. Shaw Savill*, (1916) 2 K.B. 783.

⁴ *Barnfield vs. Gooli, etc., Transport Co.* (1910) 2 K.B. 94.

⁵ (1856), 6 E. & B. 470.

of notice to the shipowner of the dangerous character of the goods, the shipper was liable for the damage caused, unless the powder was so well known an article that masters of ships ought to know of its dangerous character and that it was no defence for the shipper that he had shipped the goods, packed as he received them from third parties, without negligence.

"Goods may be dangerous within this principle if owing to legal obstacles as to their carriage or discharge they may involve detention of the ship."¹ In *Mitchell v. Steel*², a charterer shipped rice on a ship for carriage to a particular port. The discharge of rice at the port could only take place with the permission of the British Government. The charterer knew this, but the shipowner did not and could not have reasonably known it. In consequence the ship was delayed at the port. It was held that the charterer was liable to the shipowner for the delay.

The Duties and Liabilities of a Carrier by Sea under the Common Law :

A carrier by sea means the shipowner or a charterer by demise who carries goods for shippers. It cannot be laid down with any amount of certainty whether the liability of a carrier by sea is like that of a common carrier or like that of a bailee for reward only. If he has the liability of a common carrier then in the absence of any express stipulation, he will be regarded as an insurer of the goods entrusted to him and he will be liable for any loss of or damage to the goods unless caused by any of the common law exceptions, namely, (a) the act of God, or (b) king's enemies, or (c) the inherent vice of the goods or (d) a general average sacrifice³, without any negligence or deviation on the part of the carrier⁴. But if he has the liability of a bailee, his duty will be to take reasonable care of the goods only and he will not be liable for any loss or damage which has not been caused by his negligence⁵. In the earlier cases decided in England the tendency had been to regard the liability of a carrier by sea, (whether he carries goods for all and sundry or only under a

¹ *Scrutton on Charterparties and Bills of Lading*, 12th ed. p. 119.

² (1916) 2 K. B. 610.

³ *Nagent vs. Smith* (1876), 1 C.P.D. 422; Per Bowen L.J. in *Pandorf vs. Hamilton* (1886), 17 Q.B.D. at p. 683.

⁴ *Morrison vs. Shaw Savill*, (1916) 2 K.B. 783.

⁵ *Nugent vs. Smith*, *Supra*.

specific charter or on the application of private shippers only), like that of a common carrier not because he is in every case a common carrier but by reason of an alleged custom by which a carrier by sea is supposed to carry goods "at his own absolute risk, the act of God or the Queen's enemies alone excepted¹." But in later cases the existence of the alleged custom has been doubted and it has been held that the liability of a common carrier would attach to such carriers by sea only as undertake to carry goods for all and sundry and are within the definition of a common carrier *e.g.*, a shipowner who carries goods in a general ship. And shipowners, other than of general ships, *i.e.*, those who are not common carriers, are to be regarded only as bailees and will incur liability only if any loss or damage is occasioned by his negligence to exercise reasonable care and diligence.²

It is, however, only a matter of academic interest as to whether the liability of a carrier by sea is, in the absence of any express stipulation, like that of a common carrier or a bailee; for in practice the liability of a carrier is almost always defined in a contract of affreightment whether contained in a charterparty or evidenced by a bill of lading and in the case of bills of lading issued in India the duties and liabilities of a carrier are defined by the Carriage of Goods by Sea Act, 1925.

In actual practice a carrier very rarely incurs the liability of a common carrier; for the charterparty or the bill of lading under which he carries goods invariably contains excepted clauses which exempt him from liability for any loss of or damage to the goods caused by certain perils specified in the clauses unless the perils causing the loss or damage could have been avoided by his reasonable care and diligence. These excepted clauses in a maritime contract are known as "excepted perils."

Excepted Perils :

We have already seen that "excepted perils" refer to those clauses in a charterparty or a bill of lading which relieve the carrier of his liability for any loss of or damage to the goods intrusted to him caused by any of the perils specified in those

¹ Per Brett J. in *Liver Alkali Co. vs. Johnson*, (1874) L.R. 9 Ex 338 at p³ 344.

² *Nugent vs. Smith*, *Supra*; *The Xantho*, (1887), 12 A.C. 503; *The Dulro*, (1869), L.R. 2 A. & E. 393.

clauses. In a charterparty the "excepted perils" clauses also exonerate the charterer from his liability for failing to perform his part of the contract, e.g., loading the cargo within the specified time, as a result of any of the excepted perils. Under the common law no restriction is placed on the right of the carrier to limit his liability for carrying and delivering the goods entrusted to him in the same condition as that in which he received them by inserting any exception in the contract. As a result carriers have often been inclined to expand the 'excepted perils' clauses so as to cover almost every ground on which they might be held liable. This tendency has, however, been checked by the passing of the Carriage of Goods by Sea Act, 1925, which prohibits a carrier carrying goods under a bill of lading issued in India from contracting out of his liability for negligence in performing his duties enjoined by the Act or in taking reasonable care for loading, stowing, handling or discharging the goods¹. We shall discuss the effects of the Carriage of Goods by Sea Act, 1925 on the liabilities of a carrier later on. Apart from the effect of the Carriage of Goods by Sea Act, a carrier cannot under the exceptions claim exemption from liability for any loss or damage caused by his negligence or that of his servants or by a breach on his part of the implied warranty of seaworthiness or the implied warranty against deviation unless the exceptions in the contract expressly provide for exemption of liability arising from any of these grounds. In *Sjordet v. Hall*² goods were shipped under a bill of lading containing the excepted peril, "the act of God." The captain filled the boiler of the ship with water on the night previous to the date of the sailing. As a result of frost coming on during the night, the tubes burst damaging the goods. It was held that the negligence of the Captain excluded the exception, though frost was an "act of God." Similarly in *Steel vs. State Line Steamship Co.*³ goods were shipped under a bill of lading which excepted "perils whether or not arising from the negligence of the shipowner's servants, risk of craft or hull, or any damage thereto, etc." The goods were damaged as a result of seawater entering through the negligence of some of the crew in leaving a port hole insufficiently fastened. It was held that if

¹ Carriage of Goods by Sea Act, 1925, Art. III, 2 & 8

² (1828) 4 Bing. 607.

³ (1877) L.R. 3 A.C. 72

this were so at the beginning of the voyage, the ship was unseaworthy and the exceptions in the bill of lading do not protect the shipowner, as they do not apply till the voyage has begun.

A carrier will be protected from liability under the exceptions only if the loss or damage is proximately caused by any of the excepted perils and not otherwise. Proximate cause does not mean the last cause in a chain of causes but the direct and dominant cause, though not necessarily the lost cause in point of time¹. Suppose goods are shipped under a bill of lading which excepts "perils arising from fire." Goods are damaged by water poured to extinguish a fire. In this case though the last cause is the pouring of water, yet fire being the dominant cause, the shipowner will be protected under the exception.

The usual excepted perils which are provided for in a charter-party or a bill of lading are the following :—

- (a) *Perils of the Sea*—The term 'perils of the sea' has the same meaning in a maritime contract as in a marine insurance policy. We have already discussed it in connection with marine insurance. Where loss or damage occurs due to perils of the sea, the shipowner is relieved of liability if 'perils of the sea' is excepted in the contract of affreightment.
- (b) *Act of God*—We have also discussed the meaning of this term in our discussion on marine insurance.
- (c) *King's enemies*—This has also been noted in the chapter on marine insurance.
- (d) *Arrests or restraints of princes, rulers and peoples*—This has also been studied in connection with marine insurance.
- (e) *Pirates, robbers and thieves*—We have also studied this in our discussion on marine insurance.
- (f) *Barratry*—This has also been discussed in connection with marine insurance.
- (g) *Negligence of master and mariners*—This exception is engrafted in a maritime contract in order to enable the carrier to claim protection under the excepted perils even where loss of or damage to the goods entrusted

¹ *Leyland S. S. Co. v. Norwich Union* (1918) A.C. 350.

to him is caused by the negligence of the master and the crew. But this will not protect the carrier if the ship was unseaworthy at the start due to the negligence of the master or the crew¹, nor would it protect the carrier if he deviates without justification unless he can show that the loss or damage would have occurred in any event². This clause can now be inserted only in a charterparty; for under the carriage of goods by Sea Act, a shipowner under a bill of lading cannot contract out for the negligence of his servants in performing the duties imposed by the Act and in taking reasonable care for the goods entrusted to him³. But the Act exempts a carrier from liability for the neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship⁴.

Duties of a Carrier by Sea under the Carriage of Goods by Sea Act :

The Carriage of Goods by Sea Act, 1925, applies only where goods are shipped under a bill of lading whether pursuant to a charterparty or not or a similar document of title⁵. In the first place it defines the liability of a carrier by sea by imposing certain duties on him which the carrier cannot contract out. In the second place it defines the immunities of a carrier by sea by exempting him from liability in certain specified cases. Its object has been on the one hand to deprive the carrier of his freedom to contract out of his common law liabilities and to grant him substantial protection on the other.

The duties imposed by the Act on a carrier by sea under a bill of lading are as follows :—

- (1) The carrier is bound, beforehand at the beginning of the voyage, to exercise due diligence to—
 - (a) makes the ship seaworthy ;
 - (b) properly man, equip and supply the ship ;

¹ *Steel vs. State Steamship Co.* (1877) L. R. 3 A. C. 72;

² *Morrison vs. Shaw Savill*, (1916) 2 K. B. 783.

³ Art. III rr. 2 and 8;

⁴ Art. I, r. 2 (a);

⁵ Art. I (b).

- (c) make the holds, refrigerating and coal chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
- (2) The carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried subject to the immunities granted to him under the Act.

Liabilities of a Carrier by Sea under the Carriage of Goods by Sea Act and the Merchant Shipping Act, 1894 :

Under the Carriage of Goods by Sea Act, 1925, a carrier by sea carrying goods under a bill of lading issued in India or a similar document of title is absolutely liable for any loss or damage to or in connection with goods arising from the negligence, fault or failure of the carrier in the duties and obligations imposed on him by the Act *i.e.*, his failure to exercise due diligence to make the ship seaworthy or to take reasonable care in loading, handling, discharging or carrying the goods. Any clause in the contract of carriage which would relieve the carrier or the ship from liability for such loss or damage would be null and void¹. But a carrier carrying goods otherwise than under a bill of lading, *e.g.*, under a charterparty where no bill of lading is issued to the charterer is at liberty to enter into any agreement in any terms as to his liability for such goods whether by way of exempting his liability altogether or otherwise provided such an agreement is not illegal or contrary to public policy. As the carriage of Goods by Sea Act applies in the case of shipments covered by documents of title similar to a bill of lading, it appears that the liability of a carrier, where goods are shipped under a contract evidenced by a receipt, would be the same as where the shipment is under a bill of lading. But where goods are shipped under a contract, the terms of which are embodied in a receipt which is not negotiable and marked as such, the carrier may enter into any contract relieving his liability, whether arising from his breach of duty under the Act or not, in any terms, provided the agreement is not illegal or contrary to public policy and the goods, which are agreed to be carried, are not ordinary shipments in the ordinary

¹Art III, r. 8 :

course of trade but are such or the circumstances, conditions and terms of their carriage are such as would reasonably justify a special agreement e.g., articles of special value like gold or silver or the carriage of ordinary commodities in times of war or similar emergencies¹.

A carrier by sea or a shipowner carrying goods under a bill of lading or a similar document of title is entitled to the following immunities under the carriage of Goods by Sea Act, 1925, unless he surrenders the immunities or agrees to increase his responsibility and liability in a greater degree than is required by the Act²:—

Protection under
the carriage
of Goods by
Sea Act.

- (1) A carrier or shipowner is not liable for any loss or damage arising or resulting from unseaworthiness of the ship unless such loss or damage is caused by want of due diligence on the part of the carrier to make the ship seaworthy and to properly man, equip and supply the ship and to make the holds, refrigerating and coal chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. If, however, any loss or damage is caused by unseaworthiness, it is for the carrier to prove that he exercised due diligence and care³.
- (2) A carrier or a shipowner is not liable for any loss or damage arising or resulting from⁴—
 - (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or the management of the ship. Leaving the hatches of the ship uncovered whereby the cargo is damaged has been held to be neglected in management entitling the carrier to protection in *Gosse Millerd v. Canadian Government Merchant Marine*⁵. Management of the ship means management of the whole ship and not of any particular cargo carrying apparatus e.g., the holder or refrigerator. The

¹ Article VI.

² Art. V;

³ Art. IV, r. 1.

⁴ Art. IV, r. 2.

⁵ (1928) 1 K.B. 717 C.A.

carrier could be liable for any loss or damage arising from the mismanagement of such apparatus¹. Similarly the stealing of cargo by the crew would not be an act of management and the carrier will not be protected².

- (b) Fire unless caused by the fault, or privity of the carrier. It seems that the carrier will not be protected if it is caused by the negligence of the carrier to make the ship seaworthy³.
- (c) Perils, dangers and accidents of the sea or other navigable waters. We have already seen that perils of the sea do not mean every peril which may occur on the sea but mean perils of and due to the sea.
- (d) Act of God e.g., a tempest.
- (e) Act of War.
- (f) Act of public enemies.
- (g) Arrest or restraint of princes, rulers or people, or service under legal process.
- (h) Quarantine restriction.
- (i) Act or omission of the shipper or owner of the goods, his agent or representative.
- (j) Strikes or lock-outs or stoppage, or restraint of labour from whatever cause, whether partial or general.
- (k) Riots and civil commotions.
- (l) Saving or attempting to save life or property at sea.
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- (n) Insufficiency of packing. This, of course, will not protect a carrier as against an indorsee of the bill of lading if the insufficiency was apparent when the goods were delivered to him⁴.
- (o) Insufficiency or inadequacy of marks.

¹ *Formanand Ellens vs. Federal S. N. Co.* (1928) 2 K.B. 424.

² *R. J. Brown & Co. vs. T. & J. Harrison* (1927) 96 L.J.K.B. 1025.

³ *Royal Exchange Assurance vs. Kingsley Navigation Co.* (1923) A.C. 235 where a similar provision in the Canadian Carriage of Goods by Water Act, 1910 came to be decided.

⁴ *Silver vs. Ocean S. S. Co.* (1930) 1 K.B. 416.

- (p) Latent defects not discoverable by due diligence.
- (q) Any other cause arising without the actual fault of the carrier or¹ without the fault or neglect of his agents, but the carrier has to prove that the loss or damage was not caused by his fault or by the fault or neglect of his agents.

(3) A carrier is not liable for any loss or damage resulting from any deviation in saving or attempting to save life or property at sea or from any other reasonable deviation².

(4) A carrier or a shipowner will not in any event be liable for any loss or damage to goods in any amount exceeding £100/- per package or unit, or the equivalent of that sum in any other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. By agreement between the carrier and the shipper the maximum of £100/-, payable by the carrier where goods exceeding that value are not declared, may be increased but not reduced. The declaration required by the Act in order to make the carrier liable for any sum greater than £100 - is *prima facie* evidence of the truth of the facts contained therein but is not conclusive against the carrier who is at liberty to prove that the goods were not in fact of the declared value or nature in case any loss or damage is caused to the goods and claims are made against the carrier on the basis of the declared value. If the nature and value of the goods have been knowingly misstated by the shipper in the bill of lading the carrier will not be liable in any event for loss or damage³.

(5) Goods of inflammable, explosive or dangerous nature, which have been shipped without the knowledge and consent of the carrier, may be landed at any place at any time prior to their discharge or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods is liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. Even if such goods are shipped with the knowledge and consent of the carrier, his master, or agent, the carrier may, if they become a danger to the ship or

¹ It should be read as "and"—See L. J. Brown & Co. *vs.* T. & J. Harrison (1927) 96 L.J.K.B. 1025.

² Art. IV, r. 4.

³ Art. IV, r. 5.

cargo, land them at any place or destroy or make them innocuous without liability on the part of the carrier except the liability to contribute to a general average loss where they are destroyed or sold at an under value before discharge¹.

(6) Unless notice of any loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods or if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading excepting where there has been a joint survey and inspection at the time of removal. In any event the carrier is discharged from all liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. In the case of any actual or apprehended loss or damage, the carrier and the person who receives the goods must give all reasonable facilities to each other for inspecting and tallying the goods.²

The Merchant Shipping Act, 1894 is an Act of the British Parliament. Sections 502 and 503 give certain protection to shipowners, British and Foreign, which applies to the whole of the British Empire³ and the carriage of Goods by Sea Act does not affect or alter it⁴. Shipowners include a charterer by demise but not an ordinary charterer who enters into contracts of carriage with shippers⁵. The immunities granted by the Merchant and Shipping Act, 1894, may be enumerated as follows :—

(1) The owner of a British sea-going ship or of any share therein is not liable for any loss or damage happening without his actual fault or privity in the following cases, namely,⁶

(a) Where any goods are lost or damaged by reason of fire on board the ship ; or

¹ Art. IV, 46.

² Art. III, r. 6.

³ Merchant and Shipping Act, 1894, S. 509.

⁴ S. 7 (1).

⁵ The Steam Hopper, No. 66, (1908) A.C. 126 ; Merchant and Shipping Act, 1906, S. 71.

⁶ S. 502.

- (b) where any gold, silver, diamonds, watches, jewels, or precious stones, the true nature and value of which have not been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are taken in or put on board the ship and are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.
- (2) The owners of a ship, British or foreign, are not liable to damages beyond the maximum amounts mentioned below where such damages are caused without their actual fault or privity in any one of the following cases, namely¹:—
- (a) where any loss of life or personal injury is caused to any person carried in the ship or
 - (b) where any loss of life or personal injury is caused to any person carried in any other vessel due to the improper navigation of the ship ;
 - (c) Where any damage or loss is caused to any goods, merchandise or other things whatsoever,² on board the ship ;
 - (d) where any damage or loss is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, due to the improper navigation of the ship ;

The maximum amount payable by the owners of the ship as compensation is the amount calculated at £15/- for each ton of the ship's tonnage where loss of life or personal injury is caused either alone or together with loss or damage to vessels, goods merchandise or other things.² But where there is loss of life or personal injury together with loss of goods, vessels etc., the claimants for loss of life or personal injury are alone entitled to a maximum amount calculated at £7/- per ton of the ship's tonnage out of the total maximum of £15/- per ton of the ship's tonnage and the remaining part of £8/- per ton of the ship's tonnage is the maximum payable to the claimants for loss of or damage to goods, vessels, etc. But if the loss of life or personal injury is assessed by the court at an amount exceeding the

¹ S. 503 (1), (a), (b), (c) & (d).

² S. 503 (1), (i) & (ii).

maximum calculated at £7/- per ton of the ship's tonnage, the claimants for such loss will be entitled to a proportionate share in the residue *i.e.*, in the £8/- share of the total maximum calculated at £15/- per ton of the ship's tonnage.¹ It seems that if the loss of life or personal injury is assessed at less than the £7/- share, the claimants for the loss of goods, vessels etc., cannot claim in the residue of that share which will enure to the benefit of the owners of the ship. Where there is loss of life or personal injury only, the claimants for such loss are entitled to claim upto the maximum amount calculated at £15/- per ton of the ship's tonnage. But if such loss is assessed at less than the maximum the claimants cannot claim anything more than the assessed amount. Where there is loss or damage to goods, vessels, merchandise etc., the claimant for such loss cannot get more than a maximum amount calculated at £8/- per ton of the ship's tonnage.² The following example will make the position clear.

The owners of a ship, X, weigh 1000 tons. Due to bad navigation it collides against another ship Y, as a result of which Y sinks along with her cargo. The value of Y is, £20,000/- and that of her cargo Rs. 20,000/-. The total loss is, therefore, Rs. 40,000/-. As the loss is only of goods and the vessel, the owners of X will have to pay Rs. 8000/- only *i.e.*, the maximum amount calculated at £8/- per of the ship's tonnage of 1000 tons.

This Rs. 8000/- will be paid as between the owners of Y and those of her cargo proportionately *i.e.*, Rs. 4000/- to the owners of Y and Rs. 4000/- to the owners of her cargo. But suppose in addition to this loss seven lives on board of both X and Y are lost. The owners of X will then be liable to a maximum compensation of £15,000/-, calculated at £15/- per ton of the ship's tonnage. Out of this £15,000/- the claimants for the loss of the lives will be entitled at once to £7000/-, being the £7/- part of it. If the loss of lives is assessed by the court at £7000/-, the claimants in respect thereof will have no further claim on the residue. If it is assessed at less than £7000/-, say £5000/-, the remaining £2000/- out of £7000/- will go to the benefit of the owners of X and not to the owners of Y or those of her cargo. But if the loss of lives is assessed at more than £7000/-, say,

¹ The *Victoria* (1888), 13 P. D. 125; see also *The Corathie*, (1897) p. 178.

² S. 503 (1), (ii).

£17,000/-, then the claimants thereof will be entitled to a proportionate share in the remaining £8/- part of the total of £15,000/- *i.e.*, £8000/- for the unsatisfied balance of £10,000/- along with the claims of the owners of Y and those of her cargo. The residue after paying off £7000/- to the claimants for the loss of lives is £8000/- On this £8000/- the owners of Y, the owners of her cargo, and the claimants for the loss of lives have their respective claims for £20,000/-, £20,000/- and Rs 10,000/- (being the unsatisfied balance for the compensation payable for the loss of lives)

The total of these claims is £50,000/- of which $\frac{2}{5}$ th is that of the owners of Y, $\frac{2}{5}$ th is that of the owners of the cargo and $\frac{1}{5}$ th is that of the claimants for the loss of lives for the unsatisfied balance. Therefore, the owners of Y will get a proportionate $\frac{2}{5}$ th share of £4000, £3200, the owners of her cargo will get the same amount of £3200 and the claimants for the loss of lives will get a proportionate $\frac{1}{5}$ th share of £8000, *i.e.* £1600/- That is out of the total maximum amount payable by the ship owners namely £15,000/- £4000/- will go to the claimants for the loss of lives, £3200/- will go to the owners of Y and £3200/- will go to the owners of her cargo. But suppose there is no loss of vessel or cargo but a loss of only two lives. The court will assess the damage for the loss of each one of these lives by taking into consideration all relevant circumstances namely, the age of the deceased his expectation of life the number of his dependents, the means of livelihood of his dependents and so on. Suppose, of the two lives one was an old man with hardly many years to live and having only one dependent namely, a widow who has sufficient means to maintain herself and the other was a young man who had many dependents without any other means of livelihood excepting the income earned by him. The court will assess a greater damage for the loss of the young man's life than that for the old man's life. Suppose the court assesses £20,000/- for the loss of the young man's life and £10,000/- for that of the old man's life. The total loss is then £30,000/- of which $\frac{2}{3}$ rd will go to the claimants for the loss of the youngman's life and $\frac{1}{3}$ rd to that for the loss of the oldman's life. The maximum amount payable by the owners of X is £15,000/-, calculated at £15/- per ton of the ship's tonnage of 1000 tons. Therefore the claimants for the loss of the youngman's life will get a proportionate $\frac{2}{3}$ rd share of the £15,000/- *i.e.*, £10,000/- and the claimant for the loss

of the old man's life will get a proportionate $1/3$ rd share of the £15,000/- i.e., £5,000/-.

Clauses in a Charterparty :

A charterparty, as we have already seen, is itself the contract of affreightment. It usually sets out in detail the duties of the charterer and the shipowner. The performance of the contract by the shipowner and the charterer takes place after the signing of the charterparty. The following are the usual clauses in a charter party :—

(a) *Proceeding to the place of loading* : This clause imposes duty on the shipowner to proceed to the place of loading. The port to which the ship is to proceed may be named in the charter or it may be left to the charter to name, being "a port as ordered". Where the port is named in the charter or is named afterwards by the charterer, the ship is bound to go there for the purpose of loading the cargo furnished by the charterer, even if the ship cannot get to the port or the port is unsafe, unless the charterparty contains a stipulation that the ship is to proceed to the port or as near as she can safely get or that the port is a "safe port". A "safe port" means a port which is not only physically safe for the ship to get to but also politically safe.¹ The shipowner will fulfil his obligation if the ship gets to the port or as near as she can safely get or to any safe port where the charterparty permits the same. As to the time within which the ship is required to reach the port of loading, charterparty usually provides that the ship should reach the port of loading either by a fixed date or with reasonable or all convenient speed. Where the charterparty is silent on this point, the shipowner is nevertheless bound to exercise due diligence to reach the port with reasonable or convenient speed.² If the shipowner fails to bring the ship to the port of loading or as ne^{at one}ereto as she can safely get or to any other safe port, as the case may be, within the fixed day, where the day is fixed or within a reasonable time, where no day is fixed the charterer can, in all cases, except where the delay is caused by any of the excepted perils specified in the charterparty, recover damages suffered by him for the delay.³ But whether such delay

¹ *The Teutonia* (1872), L. R. 4 P. C. 171 at pp. 181, 182.

² *MacAndrew vs. Chapple* (1865), L. R. 1 C. P. 643.

³ *Barker vs. MacAndrew* (1865), 18 C. B. N. S. 759.

will entitle the charterer to cancel the contract and refuse to load depends on whether the delay is so inordinate as to amount to a frustration of the commercial adventure embodied in the charterparty.¹ If the delay is not such as to defeat the commercial object of the adventure, the charterer cannot throw up the charter and he will have to rely on such remedies as he may have by way of damages unless the delay is brought about by an excepted peril.² In *Hudson vs. Hill*³ a ship was chartered on 28th December, while lying at U, to proceed forthwith to X, and there load, perils excepted "which may prevent the loading or delivery of the cargoes during the said voyage." Owing to delays caused by excepted perils, the ship did not reach X till 28th July whereupon the charterers refused to load. It was found as a fact that the delay did not defeat the commercial object of the adventure. It was accordingly held that "forthwith" meant without the reasonable delay; that the exceptions applied to the voyage to the port of loading and that the charterers were not justified in cancelling the charter. In order to protect the charterer, it is usual to have a "cancelling clause" in the charterparty which entitles the charterer to cancel the contract on the failure of the ship to reach the port within the fixed date or within a reasonable time where no date is fixed. Where there is a cancelling clause in case of delay which is such as to defeat the object of the adventure, the charterer can cancel the contract even if the delay is brought about by an excepted peril. In *Smith vs. Dart*⁴, a ship was chartered to proceed to a port and there load, certain perils being excepted, the charterer having the right to cancel the charter if the ship did not reach the port of loading and be ready to load by 15th December. Through excepted perils, the ship could not be ready to load on 15th December. It was held that the charterer was entitled to cancel the contract. The charterer may in addition to cancelling the charter, where he is entitled to do so, sue the shipowner for damages caused by the delay unless it is brought about by excepted perils.⁵ The charterer may, on the otherhand, where he is entitled to cancel the charter, elect to affirm it and load his cargo

¹ *Jackson vs. Union Marine Insurance Co.* (1874) L. R. 10 C. P. 125 ;

² *Barker vs. MacAndrew* (1865), 18 C. B. N. S. 759 ;

³ (1874), 43 L. J. C. P. 273 ;

⁴ (1884), 14 Q.B.D. 105.

⁵ *Nelson vs. Dundee East Coast S. S. Co.* (1907). Sess. Cas. 927

and sue the shipowner for damages caused by the delay unless it is brought about by an excepted peril.¹

(b) *The loading of the cargo*—This clause imposes the duty on the charterer to load the cargo. When the ship is at the place where she is bound to be *ie*, either at the port or as near thereto as she can safely get as the case may be, and the charterer has been notified about the readiness of the ship to load, the ship is regarded as an *arrived ship*. The obligation of the charterer to load begins only after the ship becomes an arrived ship. In the absence of any stipulation to the contrary, the duty of the charterer to supply cargo according to the charter is absolute. This duty is threefold, namely, (a) the cargo must reasonably comply with the terms of the charter, (b) the charterer must bring the cargo to the loading place, if it is not already there and (c) the charterer must perform his part of the actual loading, if any.

As regards (a) the duty of the charterer is to load the kind of cargo specified in the charterparty if any. If he loads a cargo of different description whose freight is higher than that of the chartered freight, the shipowner can claim the excess freight. In *Steven vs. Bromley*² a ship was chartered to load at New York a cargo of steel billets at 23 sh a ton. The charterer shipped 1208 tons of Steel billets and 987 tons of other goods, the market rate of freight for which was higher than 23 sh a ton. It was held that the shipowner was entitled to the higher rate of freight on the 987 tons. Where the charterer has the option to load alternative cargoes *e.g.*, a full cargo of 'wheat and/or maize and/or rye', the charterer will not be relieved of liability if he is prevented from loading one kind of cargo *e.g.* wheat by an excepted peril, for he can as well load either maize or rye.³

As regards (b) the duty of the charterer is to bring the goods to the place of loading, and in the absence of any agreement or custom of the port, to the side of the ship. This duty is absolute and the excepted perils in the charterparty do not apply to the bringing of the cargo to the port of loading, but applies to the operation of putting the cargo on board only⁴. The charterer will not, therefore, be relieved of his liability of bringing the cargo to

¹ *Barker vs MacAndrew*, Supra

² (1919) 2 K B 722.

³ *Brightman vs Bunge Y Born*, (1924) 2 K B 619

⁴ *Coverdale vs Grant* (1884) 9 A C 470

the port of loading even if he is prevented from doing so by circumstances beyond his control *e.g.*, strikes,¹ bankruptcy of merchants supplying the cargo,² non-existence of such cargo,³ or impossibility of carrying the cargo, when obtained, to the port of loading due to ice, railway delays or Government orders.⁴ For failing to provide the cargo or any part of it the charterer is liable to pay compensation or damage to the shipowner equivalent to the freight lost thereon. But the charterer is relieved from this liability in the following cases —

- (i) If the charterparty provides expressly for any exception in bringing the cargo to the port of loading and the charterer is prevented from bringing the cargo by reason of the excepted cause
- (ii) If the charterparty contains an implied exception excusing the charterer from liability for failing to bring the cargo to the port of loading and the charterer is prevented from bringing the cargo by the excepted event. Thus if the cargo must necessarily be conveyed from a particular place in a particular manner, an exception will be implied that if the transit is prevented by an excepted peril expressly mentioned in the charter, the charterer will not be liable provided he can show that there was no other method of bringing the cargo to the port of loading.

In *Hudson v. Ede*,⁵ a ship was chartered to load grain at a particular port, the cargo to be brought alongside the ship at the port of loading and loaded within thirty days, delay in loading being excepted in case it was caused by ice. The charterer would not load the ship within the fixed time as a result of the river through which the grain was to have been brought to the port of loading being blocked by ice. In an action by the shipowner for damages for detention of the ship beyond the stipulated period, it was found that the only method by which the grain could have been brought to the port

¹ *Ibid.*, p. 476, per Lord Selbourne

² *Ibid.*

³ *Hills v. Sughrne* (1846), 15 M. & W. 253.

⁴ *Coverdale v. Grant*, *Supra*.

⁵ (1868), L.R. 3 Q.B. 412.

of loading was the transit by the river. It was accordingly held that the transit being rendered impossible by an excepted peril, namely, ice, the charterer was not liable for the delay.

- (iii) If both the charterer and the shipowner knew that the cargo would have to be obtained from a particular source or under certain circumstances which might cause delay in obtaining it and such delay in fact occurs.¹ In *Harris vs. Drusman*² ship was chartered to load at a particular colliery. Before signing the charterparty both parties knew that the colliery engine had broken down and was being repaired. It was held that the charterer would not be liable in case of delay in bringing the cargo provided the engine was repaired and the cargo was loaded within a reasonable time.

As regards (c) the duty of the charterer ceases as soon as he brings the goods by the side of the ship and in the absence of any special custom or agreement, the duty of putting them on board and stowing them is on the shipowner, who is liable for any loss or damage caused by his negligence or that of the stevedores employed.³ But if the charterparty provides for anything to be done by the charterer, the charterer is liable for his failure to do it unless he is excused by the excepted perils mentioned in the charterparty. The excepted perils apply to the operations connected with putting the goods on board the ship, as we have already noticed.

A charterparty usually provides that the charterer is to load a certain number of tons or a "full and complete cargo" either of specified goods or goods in general. Where the charterer is to load a full and complete cargo, the duty of the charterer is to load as much cargo as the ship can carry with safety,⁴ subject to modification which any custom of the port of loading may impose.⁵ Thus where the goods are of such a nature that they cannot be loaded without having spaces in the ship's holds known as "broken Stowage" e.g., when sugar or molasses are loaded in

¹ *Ardan S. S. Co vs. Wier* (1905) A.C. 501.

² (1854), 23 L.J. Ex. 210.

³ *Blaikie vs. Stembridge* (1859), 6 C.B.N.S. 894.

⁴ *Heathfield vs. Rodenacher* (1896), 2 Com. Cas. 55 (C.A.).

⁵ *Cuthbert vs. Cumming* (1856), 11 Ex. 405.

hogsheads and puncheons respectively leaving broken stowage, the broken stowage has to be filled up by the charterer unless he is exempted from doing so by the custom of the port of loading.¹

(c) *Cesser Clause* — This clause provides that the liabilities of the charterer under the charterparty will cease on the cargo being shipped and is usually inserted in consideration of the charterer granting to the shipowner a lien on the cargo for demurrage and dead freight. The exemption granted to the charterer is co-extensive with the lien conferred on the shipowner and charterer, in spite of the clause remains liable for claims for which no lien is granted to the shipowner. Thus where in a charterparty shipowner was given a lien on the cargo for demurrage only and not for damages for detention, and the charterer was relieved from liability on the cargo being loaded it was held that the charterer was liable for damages for detention but not for demurrage for which the shipowner was given a lien.²

(d) *Unloading or discharge of the cargo* — This clause provides for the duty of the shipowner to proceed with his ship to the port of discharge and arrange for the discharge of the cargo. In the absence of any special agreement or custom the duty of the shipowner is to get the goods out of the ship's hold and place them on the ship's deck or alongside and he is not bound to give notice of his readiness to unload either to the charterers, or to 'shippers' or consignees under bills of lading.³ The duty of having the cargo unloaded after it has been taken out of the ship's hold is in the absence of agreement or custom, on the charterer or the shipper.⁴ If no time is fixed by the charterparty or the bill of lading, the consignee is entitled to a reasonable time for unloading his cargo.⁵ But the matter is invariably governed either by agreement, custom, or by statute.

Where goods belonging to different shippers get mixed up so

¹ Cuthbert *vs* Cumming (1856) 11 Ex. 405

² Hinsen *vs* Harold (1894) 1 Q.B. 612

³ See *infra* for difference between demurrage and damages for detention

⁴ Francesco *vs* Massey, (1873) L.R. 8 Ex. 101

⁵ Bellantyne *vs* Paton, (1912) 55 Sess. Cas. 246

⁶ Harman *vs* Mart (1815) 4 Camp. 161

⁷ Portlethwaite *vs* Freeland, (1880) 5 A.C. at p. 608, per Lord Selborne

⁸ Bourn *vs* Bithff (1844) 11 Cl. & Fin. 45 at p. 70

as to become unidentifiable during the voyage due to the fault of the shipowner, the shipowner is liable for any loss which the shipper may suffer. But if such an event is caused by excepted perils, the shipowner is not liable and the owners of the mixed-up goods become tenants-in-common of the entire quantity of mixed goods in the proportions to which they have severally contributed to that whole¹ and the shipowner must deliver the whole or the proceeds thereof in such proportions -

(c) *Demurrage* — A charterparty usually contains the demurrage clause which provides that the charterer will have to finish the loading or unloading within a fixed time or at a fixed rate, e.g., 200 tons per day, from which the time required can be easily ascertained and in default to pay an agreed sum per day upto a fixed number of days or for each day the ship is delayed after the fixed time. The time so fixed for loading or unloading is known as *lay days*. Where no time is fixed or where the charterer is required to load and unload "with customary despatch" or similar terms, the duty of the charterer is to complete the work within a time which is reasonable having regard to the circumstances existing at the place of loading or unloading and the custom of the port.²

"Demurrage, in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damage for delay beyond a stipulated or reasonable time for loading and unloading."³ The stipulation as to the payment of liquidated damages is called *exhaustive* when the charterer agrees to pay a liquidated amount by way of compensation for delay for each day's delay upto a reasonable time after the expiry of the lay days, where the lay days are fixed or after the expiry of a reasonable time where the lay days are not fixed e.g., "ten days for loading (or loading with customary despatch) and demurrage at £20' per diem afterwards", which covers all delay upto a reasonable time. The stipulation is called *partial* when the liquidated amount is to be paid for each day's delay upto a specified number of days after the expiry of the lay days or of a reasonable time according as whether the lay days are fixed or not e.g. "ten days to load, (or loading with

¹ *Spence vs Union Marine Co*, (1868) 1 L.R. 3 CP 427

² *Scrutton on Charterparties & Bills of Lading* 12th ed

³ *Postlethwaite vs Freeland* (1880), 5 A.C. 599

⁴ *Scrutton on Charterparties*, 12th ed, p. 347

customary despatch) ten days on demurrage at £20/- per diem" which covers delay only for the demurrage days.

Where the demurrage clause is exhaustive *i.e.*, where the demurrage days are not fixed or where the demurrage days are fixed, all delay after a reasonable time from the expiry of the lay days in the first instance and all delay after the demurrage days in the second instance entitle the shipowner to unliquidated damages for detention. Unliquidated damages for detention should be clearly distinguished from demurrage proper. So long as the charterer's liability to pay demurrage continues, the charterer has the right to detain the ship on payment of the demurrage and the demurrage clause has the effect of extending the lay days.¹ But when the period during which the demurrage is payable expires (*i.e.* after the expiry of a reasonable time from the end of the lay days where the demurrage days are not fixed or after the expiry of the demurrage days where they are fixed) and the shipowner gets the right to claim damages for detention, the charterer cannot detain the ship and the ship can sail away.²

Where there is a charterparty containing express stipulations as to demurrage, the following persons will be liable for demurrage —

- (a) The charterer unless he is relieved of liability under a cesser clause or under a new contract evidenced by a bill of lading issued subsequently.³
- (b) The parties to the bill of lading, if the charterparty stipulations as to demurrage are expressly incorporated in the bill of lading.⁴

Master of the Ship—His Duties :

The master is the highest officer on board a ship. In popular language he is known as the Captain. On a voyage under a contract of affreightment the master occupies a double position, namely, (1) he is in general the agent of the shipowner in doing what is necessary to carry out the contract, and (2) he is in case of necessity and for the preservation and benefit of the cargo the agent for the cargo-owners.

¹ *Wilson & Coventry vs Thoresen*, (1910) 2 K B 405

² *Reider vs Arcos*, (1929) 1 K B 352

³ *Scrutton on Charterparties*, 12th ed 369

⁴ *Ibid*

As an agent of the shipowner he has to perform all the duties of the shipowner under the charterparty and he can also deal with the ship in times of necessity or emergency as a man of ordinary prudence would do under the circumstances. Thus he signs bills of lading in favour of charterers or shippers. He has to provide necessaries which the shipowners have to provide under the charterparty. He has to proceed without unjustified deviation and unreasonable delay and has to make the ship seaworthy. He also has to take reasonable care for the goods carried on the ship unless the terms of the charterparty or the bill of lading exempt the shipowner from liability for the negligence of the master and the crew. The shipowner is liable for any loss or damage caused by the negligence of the master in fulfilling the under-taking of the shipowner or in taking reasonable care for the goods unless he is expressly exempted from such liability by the terms of the charterparty or the bill of lading. In times of emergency the master as an agent of necessity can do whatever is reasonable under the circumstances and his acts in this respect will bind the shipowner. Thus the master can order the mast to be cut off if it is necessary to save the ship or to raise money on the security of the ship where it is necessary to complete the voyage.

The master derives authority to act as an agent of the cargo-owner in a manner inconsistent with the ordinary rights of the cargo-owner e.g., by selling the goods or throwing them overboard or pledging them for advances of money under two circumstances -

- (1) The necessity for the action
- (2) The impossibility of communicating with the shipowners or cargo-owners or the absence of their instructions when communication has been made to them

Thus in *The Hamburg*¹ a vessel bound from South America to London with a cargo belonging to English owners, but not perishable, put into St Thomas for repair. The master without communicating with the cargo-owners raised money on a bottomry bond on ship, freight and cargo for the purpose of repair. It was found that mails left St. Thomas for London every fortnight, taking fourteen days for the journey and the master could have easily communicated to the cargo-owners and waited for their instructions in view of the fact that the cargo was

¹ (1863), 2 Moore, P.C.N.S. 289.

not perishable. It was, accordingly, held that the cargo-owners were not bound by the bottomry-bond. It may be noted here that if the cargo were perishable then the master could not have communicated with the cargo-owner without allowing a sufficient time to lapse during which the cargo would have perished and the master would have been authorised to raise the money on the bond without communicating with the cargo-owners.

Freight :

"Freight" in the ordinary mercantile sense, is the reward payable to the carrier for the carriage and arrival of the goods in a merchantable condition, ready to be delivered to the merchant."¹ In the absence of agreement the carrier is entitled to the freight stipulated in a contract of affreightment if he has substantially performed the contract by delivering the goods in a merchantable condition.² Thus he is entitled to the freight even if the goods are delivered in a damaged condition provided the goods remain as merchantable articles of the particular description.³ But no freight is payable if the goods are lost whether by reason of excepted perils or not, unless the contract of affreightment provides for advance freight or a lump sum freight or the goods are lost due to the fault of the shipper alone.⁴ Thus a carrier cannot in the absence of express agreement claim a proportionate freight for the part of the voyage during which the goods are carried if the goods are lost and cannot be delivered at the port of destination.⁵

The following are the usual kinds of freight stipulated in a contract of affreightment :—

- (a) *Simple Freight* :—This is the most common type of freight which is only payable on the delivery of the cargo at the contractual rate per unit.
- (b) *Advance freight* :—This signifies a freight which is payable at any time before the goods are delivered at destination, the actual point of time when it is to be paid being fixed in the contract. It must be paid even if the goods are lost, provided the loss occurs after the

¹ Scrutton on Charterparties and Bills of Lading, 12th ed. p. 374.

² Per Willes J. in *Oakin vs. Oxley*, (1864), 15 C.B.N.S. 646 p. 664.

³ *Ibid.*

⁴ *Cargo ex Argos*, (1873) L.R. 5 P.C. 134.

⁵ *Metcalfe vs. Britannia Iron Works*, (1877) 2 Q.B.D. 423.

due date of payment,¹ and if it is already paid the carrier can retain it.² It is immaterial whether the loss is caused by excepted perils or not.³ Advance freight should, however, be distinguished from a loan by the shipper to the shipowner, whether on the security of the freight or not, for a loan by the shipper can be recovered from the shipowner if the cargo is lost and not delivered.⁴ Whether a payment by the shipper is by way of advance freight or a loan is to be determined by the intention of the parties as expressed in the contract of affreightment,⁵ but a stipulation that it shall be paid "subject to insurance" or "less insurance", will indicate that the payment is in advance of freight.⁶

- (c) *Dead Freight* —This is the name given to the compensation payable to the carrier for loss of freight when the charterer fails to furnish a full cargo in terms of the charterparty.
- (d) *Lump Sum Freight* —This is a lump or gross sum payable by the charterer for the use of the whole ship and for the entire cargo. It is, therefore, payable if the carrier is ready to perform his contract though no goods are shipped, or though part of the goods shipped is not delivered. The carrier is entitled to payment of the lump freight agreed upon if he delivers part of the cargo, and it is immaterial whether the part remaining undelivered is lost by the excepted perils or not.⁷ If the part remaining undelivered is lost by a cause not excepted in the charterparty the carrier will remain liable for the loss but will earn the whole freight by delivering part of it.
- (e) *Time Freight* —This is a kind of freight which is payable for fixed periods of time at the end of each period specified in the charterparty. It is payable even if time

¹ *Oriental S S Co vs Taylor*, (1893) 2 Q B 518

² *Byrne vs Schiller*, (1871) L R 6 Ex 20, 319

³ *Rodocanachi vs Milburn*, (1886) 18 Q B D 67

⁴ *Watson vs Shankland* (1873) L R 2 H L Sc 304

⁵ *Allison vs Bristol Marine Insurance Co*, (1876) 1 A C 209

⁶ *Ibid.*

⁷ *The Norway*, (1865), 3 Moore, P.C.N.S. 245

is lost in prosecuting the voyage by the ship being unavoidably delayed for repairs or bad weather or on account of blockade or embargo unless it is provided otherwise in the charterparty or the delay is so great as to amount to a frustration of the object of the voyage¹

Persons entitled to freight—"The person entitled to receive payment of freight is *prima facie* the person with whom the contract of affreightment was made."² But it may also be payable to a purchaser, or to a mortgagee, of the ship or it may be assigned and made payable in favour of a third person

Liability for freight—The primary liability for the payment of freight is on the shipper or the charterer. But under the English Bills of Lading Act, 1855, a consignee or the indorsee of a bill of lading to whom the property in the goods has passed becomes liable for the payment of freight. Apart from this statutory liability a consignee or an indorsee of a bill of lading who takes delivery of goods by presenting a bill of lading under which freight is payable becomes liable to pay the freight on an implied agreement to pay the same to be inferred from the circumstances³

Shipowner's lien for freight—A shipowner has a lien at common law on the cargo carried by him for the freight due thereon. But this lien subsists only for freight payable on delivery of cargo and does not extend to advance freight, or dead freight or demurrage. In exercise of his lien the shipowner is entitled to retain the cargo until the freight is paid.

General average loss and Particular average loss :

We have discussed this subject in connection with marine insurance. So if the reader reads "subject matter of the contract affreightment" instead of 'the subject matter insured' in connection with our discussion on the subject under the chapter on marine insurance nothing more need be said here on the subject.

¹ Scrutton on Charterparties, 12th ed., p. 403 ; See also *Havelock vs. Geddes*, (1809), 10 East, 555 and *Moorsone vs. Greaves*, (1811), 2 Camp. 626.

² *Smith's Mercantile Law*, 13th ed., p. 385

³ *Sanders vs Vanzeller*, (1843) 12 L.J. Ex. 497 ; *Furness vs. White*, (1895) A.C. 40

Bottomry and Respondentia :

Where the shipowner obtains advances for the use of the ship on the security of the ship, freight and cargo, the contract whereby such advances are obtained is known as the "bottomry". Where such advances are obtained on the security of cargo only, the contract is known as "respondentia". The characteristic features of a bottomry or respondentia are as follows —

- (a) The contract must be in writing.¹ Where a bottomry is executed in the form of a bond, it is known as bottomry bond. Where a bottomry is executed in the form of a deed poll, it is known as "bottomry bill".
- (b) The contract has the effect of hypothecating the ship, freight and cargo in the case of bottomry and cargo only in the case of respondentia as security for repayment of the loan.
- (c) The money advanced on bottomry or respondentia is repayable only on the safe arrival of the ship or cargo at its destination and not otherwise. The essence of a bottomry or respondentia is that there must be a maritime risk involved so that the borrower is relieved of his liability in case the ship or the cargo which is the security for the loan is lost before arrival at destination.²
- (d) The amount of the loan, the interest to be paid, the property hypothecated for repayment of the loan and the fact that repayment depends upon the safe arrival of the ship or cargo at its destination must be stated specifically in the contract.³
- (e) The contracts of bottomry and respondentia are usually entered into by the master under an implied authority as the agent of necessity of the owner of the ship or

¹ *Ex Parte Halkett* (1815), 3 Ves & B 135.

² A bond is a deed signed and sealed by only one party to the contract whereby he binds himself to pay another a certain sum of money followed by certain conditions of repayment.

³ When there is only one party to a deed, as when a deed consists merely of a promise by A to B without any promise by B to A, the deed is called a deed poll.

⁴ *Price vs Maritime Ins. Co.*, (1901) 2 K.B. 412; *The Mary Ann*, (1865) L.R. 1 A. & E. at p. 14.

⁵ *The Heinrich Bjorn*, (1885), 10 P.D. 44, 49.

cargo. The authority of the master to hypothecate the ship or cargo arises in the following circumstances¹

(1) Where assistance is required for prosecuting the voyage and the voyage would be frustrated if no assistance is procured and there are no other resources at hand e.g., when the master has to pay to free the ship from arrest for salvage; (2) it is impossible to communicate with the owner to get his consent and (3) it is not possible to raise money on better terms or in any other manner. But where the master can communicate with the owner² or the owner has an agent who is willing to advance money³ or the money can be raised on the personal security of the owner on better terms,⁴ 'he master has no authority to enter into a bottomry or respondentia without the consent of the owner. If he does so the bottomry or respondentia will be void as against the owner.

Rights of a holder of bottomry or respondentia :

The lender on a bottomry or respondentia has a maritime lien⁵ on the hypothecated ship or cargo. If the money is not repaid within the time prescribed the lender may institute an Admiralty action for the arrest of the ship or the cargo and its sale.⁶ Where the same ship or cargo is hypothecated more than once during the same voyage the last hypothecatee has a prior claim on the sale proceeds of the ship or cargo over the prior hypothecatees on the principle that the last loan furnishes the means of preserving the ship, and without it the former lenders would have entirely lost their security.⁷ The holder of a bottomry or respondentia, however, loses all claim against the owner of the ship or cargo if it fails to arrive at its destination safely.

¹ *The Hersey* (1837), 3 Hagg. Adm. Rep. 404. *The Kinnak* (1869), 1 R. 2 P.C. 505.

² *The Oriental* (1851), 7 Moo. P.C. Cas. 398.

³ *Gunn v. Roberts*, (1874), L.R. 9 CP. 331.

⁴ *Heathorn v. Darling* (1836), 1 Moo. P.C. Cas. 5.

⁵ See *Williams and Bruce*, Admiralty Practice Part II, for the procedure in such actions.

⁶ *The Eliza* (1833), 3 Hagg. Adm. Rep. 57.

Distinction between a bottomry or respondentia and other forms of security :

We have already dealt with the different forms of securities, namely, mortgage, hypothecation, lien, and pledge.¹ A bottomry or respondentia differs from an ordinary mortgage or hypothecation in that the money lent on a bottomry or respondentia is in hazard during the voyage ; so that if the ship or cargo does not arrive safely at its destination nothing is repayable.² It also differs from a pawn or pledge in that it is not necessary that the lender should take possession of the ship or cargo. It also differs from the other forms of securities in that if there are successive lenders, the last in point of time is entitled to priority of payment.³ It is worthy of note that in the other cases of securities the prior lender has a prior right. There is also another practical difference between a bottomry or respondentia and other forms of securities. Since the money lent on a bottomry or respondentia is in danger of being lost in case the ship or cargo fails to reach its destination, the rate of interest is always excessively high.

¹ See p. 387 *supra*.

² *Stainbank vs. Fenning*, (1951) 20 L.J.C.P. 226, *The Haabet* (1899) P. 295.

³ See *Supra*.

CHAPTER XI.

BANKERS & BANKING

The law relating to bankers and banking may be divided into two distinct branches, namely, (a) the law regulating the business of banking *i.e.*, relations between bankers and their customers and between bankers and the outside world which we may for the sake of convenience call the pure law of banking and (b) the law regulating the organic side of bankers as an institution. The former deals with matters like the payment and collection of cheques and other negotiable instruments and the rights and obligations of bankers in respect thereof both in relation to their customers as well as to members of the general public. The latter deals with matters like the incorporation, management and dissolution of banking concerns. Until the passing of the negotiable Instruments Act of 1881 there was no Statute in India containing provisions applicable to the business of banking exclusively. The law of banking meant nothing more than the common law of England relating to banking subject to the provisions of the Indian Contract Act 1872. Then came the negotiable Instruments Act with its specific provisions relating to the payment and collection of cheques by a banker. But the Indian Contract Act and the Negotiable Instruments Act do not exhaust the whole field of banking law and recourse has, therefore, to be taken frequently to the common law of England as interpreted and applied in India wherever these two statutes have failed to make any provision. It may, however, be noted that even these two statutes have been framed on the basis of the English Common law. So far as the second branch of the law on the subject is concerned Banking Companies incorporated in India are governed by the Indian Companies Act, 1913 as amended by the Indian Companies (Amendment) Act of 1936 and bankers who are partnership firms are governed by the general law of partnership as contained in the partnership Act and individual bankers are governed by no specific Statute, apart from the general civil and criminal law. Under the Indian Companies Act, 1939, as amended by the Companies Amendment Act of 1936, a banking company must comply with the provisions contained therein applicable to all companies *e.g.*, the provisions relating to incorporation, registration, the hold-

ing of general meetings, auditing of balance sheets and so on. It must also comply with certain special provisions prescribed for banking companies by the Companies Amendment Act of 1936 e.g., special requirements regarding Capital, Reserve Fund and Cash Reserve. Apart from this the Reserve Bank Act, 1934, has set up the Reserve Bank and also a number of Scheduled Banks with a view to better control the banking organisation and the money market of the country as a whole.

Definition :

The term 'Banker' does not lend itself to an easy definition. Neither the Contract Act nor the Negotiable Instruments Act define the term. The Negotiable Instruments Act¹ simply states that a banker includes also persons or a corporation or company acting as bankers. This is similar to the definition given in Halsbury's Laws of England² which is as follows :— "A bank is a corporation, partnership or individual carrying on the business of banking." These definitions make it clear that a banker is distinguished by his function and business but do not define what that function and business is. Hart defines a banker or a bank as a person or company carrying on the business of receiving monies and collecting drafts for customers, subject to the obligation of honouring cheques drawn on him by the customers to the extent of the amounts available in their current accounts. But this definition of Hart ignores the following facts, namely, (a) the customers may draw cheques not only on their current accounts but may draw on other accounts e.g., savings bank accounts; (b) the withdrawals of money by customers need not be by cheque alone; and (c) a banker combines other incidental businesses e.g., lending money to others discounting bills of exchange and drafts and so on with a view to making profit. The Indian Companies Amendment Act of 1936³ adopts a more exhaustive definition and defines a "Banking Company" as a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in

¹ Sec. 3.

² Vol. I, page 568, Art. 1147.

³ Hart on Banking, 4th ed.

⁴ Sec. 277F.

addition in any one or more of the business mentioned in S. 277 F of the Act, which are more or less incidental to the business of banking. This we may also adopt as a satisfactory definition for all other banking concerns which are not companies by substituting the word "Concern" for "Company" wherever the latter occurs in the definition. It should be noted, however, that for the purposes of the Indian Companies Act, a company will be deemed to be banking company if it uses the word "Bank," or "Banking" as part of its name¹ and the liabilities imposed by that Act on Indian Companies will automatically attach to such company whether it actually carries on the business of banking or not. But for other purposes *e.g.* in matters relating to the payment or collection of cheques a concern will not have the rights and liabilities of a banker unless it trades or traffics in money, receives or remits money and negotiates bills of exchange etc., with a view to making a profit by such business. Thus a stock broker and notary public, who largely engaged in trade, received money from some of his customers and paid it out again, and occasionally discounted drafts but who neither held himself out as a banker, nor appeared to have been so considered is *not* a banker.² Similarly a trading concern dealing in cotton and opium cannot properly be called a banking business though they might have done a small amount of banking business by way of receiving money and advancing the same to others.³ Nor can a Government treasury be regarded as a bank though local boards deposit money in it and the treasury pays out money according to their orders, for the element of making profit is absent.⁴

Relation between A Banker and his Customer :

The business of banker includes the receipt of money for and on behalf of the customer which constitutes him merely the debtor of the customer with the obligation to honour the cheques of the customer so long as there are enough funds in his hands.⁵ As to who is a customer we shall discuss in detail later on under the heading collection of cheques. It is sufficient to note here

¹ Indian Companies Amendment Act (XXI) of 1942

² Rangaswami *vs* Sankara, I.L.R. 43 Mad 816

³ Stafford *vs* Harry, 12 Ir Eq R. 400

⁴ The New Flemming Spinning & Weaving Co *vs* V Kessonji, 9 Bom 373, 411

that a person may be regarded as the customer of a bank if he has some sort of account, either a deposit or a current account or some similar relation with the bank.¹ The principal duties of a bank *vis-a-vis* its customer are twofold, namely, (a) to pay the cheques drawn by the customer and (b) to collect cheques and drafts paid in by the customer. These are such important duties and may involve a bank in such heavy liabilities to the customer and also to third parties that we shall have to study these in detail. Apart from these a bank is not a trustee for the customer and the latter has no right to inquire into or question the use made of the money by the bank.² But the right of the bank to use its customers' money is subject to any specific appropriation which the customer may make in respect of the money paid by him e.g., where he pays money to reduce an overdraft account or to any particular account.

Payment of Cheques :

The obligation of a bank to pay the cheques of its customers is imposed in India by the Negotiable Instruments Act³ which lays down that the drawee of a cheque (which in every case must be a bank) having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default. It follows from this that the bank is obliged to pay the cheque of its customer provided the following conditions are fulfilled, namely, (1) *there must be sufficient funds of the drawer* (2) *the funds must be properly applicable to the payment of the cheque*, (3) *the bank must be duly required to pay* and (4) *in default it must pay damages to the customer*. We shall discuss these conditions below.

(1) *Sufficient funds*--A bank is liable to pay the cheque of its customer only if there are sufficient funds to meet the cheque in its hands. If the cheque is for a larger amount than the funds of the customer in the hands of the bank, the bank is entitled to refuse payment. But where there is a contract between the bank

¹ Per Lord Davey in *Great Western Railway Co. vs. London & County Banking Co.*, (1901) A.C. 414 at p. 420.

² *Foley vs. Hill*, (1848) 2 H.L. 28.

³ Sec. 31.

and the customer to pay the cheque even in the absence of sufficient funds as when the bank agrees to allow overdraft facilities upto a certain limit, the bank will be liable for damages to the customer for breach of contract if it dishonours any cheque drawn by the customer for an amount not exceeding the overdraft limit.¹ A bank, however, is not liable to honour the cheques of a customer on his overdraft account where the bank has duly terminated the overdraft arrangement by notice to the customer.² A customer having an account with a particular branch of a bank cannot draw cheques on another branch of the same bank where he has no account and the latter is justified in refusing to honour his cheques.³ It should be noted that the liability of a bank to honour the cheques of a customer does not depend on the sufficiency of the funds of the customer alone but also on its availability. A customer cannot draw against the amount covered by a cheque or draft drawn in his favour immediately after he has paid the same in for collection. The bank is entitled to a reasonable time for clearing or collecting cheques or drafts according to their respective nature.⁴ Even in the case of notes or gold or a cheque upon itself, the bank is entitled to a reasonable time between the paying in and drawing against in which to carry out the necessary book-keeping entries.⁵ If, however, the amount covered by a cheque or other instrument is credited as such by the bank as soon as the customer pays in, the customer is at once entitled to draw against it whether the bank has received the amount or not.⁶

(2) *Funds properly applicable*—This means that the payment required by a cheque must not be contrary to any contract subject to which the funds against which the cheque has been drawn are maintained or contrary to the purpose for which the account has been opened and kept. Thus if a customer opens an account with a bank subject to the condition and on the understanding that he will be entitled to draw only one cheque per week, the

¹ Fleming *vs.* Bank of New Zealand, (9000) A.C. 577.

² Rose *vs.* Bradford Banking Co., (1894) A.C. 586, 590.

³ Woodland *vs.* Fear, (1857) 7 E. & B. 518.

⁴ Whitaker *vs.* Bank of England, (1835) 1 Cr. M. & Rr. 744; Farman *vs.* Bank of England, (1902) 18 T.L.R. 339.

⁵ Marzetti *vs.* Williams, (1830) 1 B. & Ad. 415.

⁶ Capital & Counties Bank *vs.* Gordon, (1903) A.C. 240.

bank will have the right to refuse payment of any cheque drawn by the customer after the first cheque within the same week.

Similarly if an account is opened by a trustee, the bank has express notice that the funds are trust funds and it should refuse to honour a cheque drawn by the trustee in his favour or for some purpose other than the trust; for otherwise the bank will be liable for damage for conversion of trust moneys.¹ Similarly if an agent operating on the account of his principal draws a cheque on the account in his favour or in favour of his firm, the bank should refuse payment.² The last two illustrations are instances where payment by the bank would be contrary to the purpose of the account. As the question of trust accounts or moneys is a very difficult question we shall study it separately.

(3) *Duty Required to pay* :—The order to pay contained in a cheque must be made and communicated according to law and according to accepted practice and usage of the banking business. Thus a cheque must be presented to the bank within a reasonable time and a bank may refuse to pay a stale cheque.³ Similarly the bank is not liable if the cheque is not presented within the banking hours or when it is not legal or is drawn in a form whose legality is doubtful,⁴ or when it is irregular as when it is undated or post dated or contains unsigned alterations.

(4) *Payment of damages in Default* :—The liability of a bank which dishonours its customer's cheque without justification is liable to the customer only who draws the cheque. The holder or payee of the cheque has no right to enforce payment or claim damages from the bank unless the bank has admitted to him that it holds money specially to meet the particular cheque or has contracted with the holder or payee to honour the cheque, as in the case of irrevocable letters of credit opened by a bank in favour of the holder at the instance of a customer. The remedy of the holder is against the drawer in case of dishonour of the cheque. The reason is that the drawing of a cheque does not automatically operate as an assignment of money in the hands of the banker in favour of the payee. A customer who is aggrieved

¹ *Plunkett vs. Barclays Bank*, (1936) A.F.R. 653.

² *British American Elevator Co. Ltd. vs. Bank of Br. N America* (1919) A.C. 658.

³ S. 74 of the Negotiable Instruments Act.

⁴ *Hart on Banking*, 4th ed. 325.

by the wrongful dishonour of his cheque, may sue the bank on any one of the following three grounds :—

- (a) *Breach of Contract* :—The opening of an account by a customer with a bank creates an implied contract between the bank and the customer whereby the bank is obliged to honour the cheques of the customer provided the conditions mentioned above are fulfilled. If the bank dishonours the cheque of the customer without justification it commits breach of contract for which the customer is entitled to recover damages from the bank ;
- (b) *Negligence* — A bank has the duty of honouring cheques of its customer because of the implied contract subsisting between the two. Hence if the bank wrongfully dishonours the cheque of its customers it will amount to a breach of duty and the customer is entitled to sue the bank in tort instead of in contract for negligence and recover damages for injury to his credit and reputation
- (c) *Libel* — A customer who is aggrieved by the wrongful dishonour of his cheque may base his action against the bank on libel where the bank dishonours his cheque with remarks like 'Refer to drawer' or 'Not covered' or 'Exceeds instruction' which is likely to convey the impression in the mind of the payee that he is a dishonest person who has obtained credit or value for cheques without being able to meet them¹

Measure of Damages :

According to the old decisions substantial damages were presumed to have been occasioned to a customer by the wrongful dishonour of his cheque and he was entitled to recover substantial damages even in the absence of actual proof of injury². As Lord Tenterden observed in *Marzetti vs. Williams*³, "it is a discredit to a person and, therefore, injurious in fact, to have a draft refused

¹ *Lionell Barber & Co vs Deutsche Bank (Berlin) London Agency*, (1919) A C 304

² *Rolin vs Steward* (1854) 14 C B 595; *Summers vs City Bank* (1874) L R 9 C P 580

³ (1830) 1 B & Ad 415

payment for a small sum, for, it shows that the bank had very little confidence in the customer; it is particularly injurious to a person in trade." But the recent decisions have made a departure from the old law and seem to lay down that excepting where the customer is engaged in trade or business, actual proof of injury to credit must be given in order to entitle the aggrieved customer to recover substantial damages¹. It seems that professional men will be regarded as in the same category as business people and will be entitled to recover substantial damages without actual proof of injury if their cheques are wrongfully dishonoured. For why should not the professional honour and credit of a solicitor or doctor be regarded as damaged and his prospects injured by dishonour of a cheque in the same way as that of a green grocer or a butcher?

Discharge of the Bank's Liability :

Where a cheque payable to order purports to be endorsed by or on behalf of the drawee is discharged by payment in due course. Where a cheque is originally expressed to be payable to bearer the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation². 'Payment in due course' means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.³ Apparent tenor of an instrument means what appears to be the intention of the parties on the face of the instrument. Thus if a cheque is drawn payable to A or order the apparent tenor is that the payment should be made either to A or his endorsee. If the cheque bears an endorsement of A in blank the cheque becomes payable to bearer. If the cheque bears an endorsement of A in favour of B the cheque becomes payable to B. The bank will be relieved from liability if it pays the amount of the cheque

¹ *Wilson vs. United Counties Bank*, (1920) A.C. 102, 112.

² Negotiable Instruments Act, S. 85 (1).

³ *Ibid*, S. 85 (2).

⁴ Negotiable Instruments Act, S. 10.

to the bearer in one case and to B in the other provided there was nothing irregular or suspicious in the endorsement of A which would make the bank doubt that the holder is not entitled to receive payment

Bearer Cheques :

A banker who in good faith and without negligence *ie.*, in due course pays a discharged bearer cheque to the person who presents it is discharged from all liability and can debit his customer though the holder had no title or a defective title *eg.*, when he stole the cheque or found it after it was lost¹ But a payment before the due date² or the payment of a cancelled cheque in circumstances such as to excite suspicion³ cannot be regarded as payment in due course and the bank will remain liable for the amount of the cheque to the customer even after such payment. So also where the payee of a certain cheque sent his servant for cashing the cheque and the officials of the bank through mistake or inadvertence paid the amount to a wrong person after taking the cheque from the servant, it was held that the bank must pay over the money again to the payee⁴ A bearer cheque does not cease to be a bearer cheque even if there are subsequent endorsements on it and even if any of these endorsements purport to make it an order cheque or a non negotiable one.⁵ But if a bearer cheque is crossed the bank cannot pay it over the counter in disregard of the crossing The bank must not pay it except through another bank and if it does it cannot debit its customer with the amount of the cheque.⁶

Order Cheques :

As regards order cheques the bank is discharged if it pays to the payee or to his endorsee But the difficulty arises where the endorsement is forged and the payment is made by the bank to the indorsee of such forged endorsement If the bank pays in

¹ Bellamy *vs* Marjoribanks, (1852) 7 Fx 369 Charles *vs* Blackwell, (1877) 2 CPD 151

² Motley *vs* Culverwell, (1840) 7 M & W 174

³ Scholey *vs* Ramsbottom, (1810) 2 Camp 485

⁴ Lall Chand *vs* Agra Bank, 18 IA 111

⁵ Negotiable Instruments Act, S 85 (2)

⁶ Smith *vs* Union Bank of London, (1875) 1 QBD 31, 35; Charles *vs* Blackwell, *supra*.

good faith and without negligence *i.e.*, in due course the bank will not be liable. But if the bank is negligent *i.e.*, makes payment not in due course it cannot debit the customer with the amount of the cheque. What is negligence and whether a payment is in due course or not is a question of fact to be determined by the circumstances of each case. But the following may be cited as instances where a bank has been held to be negligent in the matter of payment :—

- (a) Where a bank pays a cheque in spite of patent irregularity in the endorsement. An endorsement is regarded as irregular where it does not correspond to the name as written and spelt in the body of the instrument. Thus if a cheque is drawn in favour of a person spelt as "John Robert Williams" or order it will be an irregular endorsement if the payee endorses it as J. R. Williams or J. Williams. In *Slingsby vs. District Bank*¹ a cheque was originally drawn "Pay J. P. & Co. or order" having a space between 'Co.' and 'or.' The cheque was got hold of by a fraudulent person who altered the cheque as payable to "J. P. & Co., per C. & P. or order" by inserting per C. & P. in the space between "Co" and "or." He then endorsed on the back of the cheque by putting C. & P. only and obtained payment from the bank. It was held that apart from the question of alteration the endorsement was irregular without the name of J. P. & Co., and the bank was guilty of negligence in making payment on such endorsement and was not entitled to protection.
- (b) Where bank pays a cheque in spite of unauthorised alterations *e.g.*, where the alteration is not initialled by the drawer or initialled by some only and not all the drawers in case there are more than one drawer.²
- (c) Where a bank pays a cheque contrary to directions given regarding the disposal of the money payable under the cheque. Thus where by arrangement between a company and its bank, the cheques of the company were to be paid in the form of bank-drafts issued by the bank in favour

¹ (1932) 1 K.B. 544.

² *Kepitigulla Rubber Estates Ltd. vs. National Bank of India*. (1909) 2 K.B. 1010

of foreign constituents of the company for the amounts of the cheques and the bank in a few cases issued bank drafts in the name of the manager of the company without taking due care and being misled by the fraud of the manager and the proceeds whereof were misappropriated by the manager, it was held that the bank was negligent in not complying with the directions of the company and was not entitled to debit the company with the amounts of the drafts issued in the name of the manager.¹

- (d) Where a bank pays a cheque after countermand *i.e.*, after the customer stops payment and the countermand is communicated to the bank.²
- (e) Where a bank pays before the due date.³
- (f) Where a bank pays a crossed cheque which has been opened by writing "pay cash" and initialled. In such case the bank pays such a cheque at its own risk and will be liable for the amount paid in case the opening proves unauthorised.
- (g) Where a bank pays a cheque on which the customer's name has been forged. Such a cheque is no cheque⁴ and it has been held that a bank ought to know its customer's signature.⁵

Determination of the Duty and Authority to Pay :

The duty and authority of a bank to pay a cheque drawn by a customer are determined :—

(1) By countermand of payment commonly known as stopping a cheque. In England this is provided for by S. 75 of the Bills of Exchange Act, 1882. In India there is no similar provision in the Negotiable Instruments Act. But it is submitted that the law is the same in India as in England ; for a payment after countermand would not be a payment in due course⁶ and generally

¹ Bank of Montreal *vs.* Dominion Gresham Guarantee Co., (1930) A.C. 659.

² Curtice *vs.* London City and Midland Bank, (1908) 1 K.B. 293.

³ Morley *vs.* Culverwell, (1840) 7 M. & W. 174.

⁴ Imperial Bank of Canada *vs.* Bank of Hamilton, (1903) A.C. 49.

⁵ Charles *vs.* Blackwell, (1877) 2 C.P.D. 151.

⁶ Bansital *vs.* Sadaseo, I.L.R. (1943) Nag. 687.

a customer who has the right to require the bank to pay has the right to revoke that order.¹ A countermand to be effective must be communicated to the bank.² But a bank is not bound to stop payment of a cheque simply on the basis of an unauthenticated telegram.³ A Bank which, however, stops payment by acting reasonably on the receipt of a telegram countermanding payment cannot be held liable for damages for wrongful dishonour if the telegram turns out to be unauthorised.⁴ A countermand should also be free from ambiguity and if it is ambiguous the bank is entitled to pay the cheque. Thus in *Westminster Bank vs. Hilton*⁵ a customer telegraphed and also telephoned to the Bank to stop payment of cheque No. 117283 for £8/- and odd to the payee Pote. A cheque bearing No. 117285 and for the same sum payable to Pote and bearing a date subsequent to the date of the countermand was presented and paid by the bank. It was held by the House of Lords that as the No. of the cheque paid was different to the number mentioned in the countermand and as the cheque bore a date subsequent to the date of the countermand the bank was justified in thinking that the cheque might have been a duplicate one and it was bound to cash it. It was observed: "It must be remembered that a bank would be sued just as much for failing to honour a cheque as for cashing one which had been stopped, and that the number of the cheque was one item of identification." The right to countermand is only exercisable by the drawer. If a cheque payable to bearer is lost the holder should ask the drawer to countermand. But if a cheque is payable to order and hence requires endorsement before payment, the holder may, in case it is lost, inform the bank directly about the loss and the bank should not pay the cheque as otherwise, it will not be a payment in due course. One partner has the power to stop a cheque issued in the firm's name; one executor can stop payment of a cheque signed by another; and one of two or more customers on a joint account can stop the cheque issued against the account.⁶

(2) *By notice of the customers' death*—This is also provided

¹ *Syed Mahommed vs. Imperial Bank*, (1940) 2 Cal. 578

² *Curtice vs. London City and Midland Bank*, (1908) 1 K.B. 293

³ *Ibid*

⁴ *Lalla Mal vs. Kesho Das*, 29 All. 49.

⁵ (1926) 136 L.T. 315 (H.L.).

⁶ *Grant vs. Taylor*, (1843), 2 Hare 413.

for in England by S. 75 of the Bills of Exchange Act, 1882. But in India there is no such specific provision and the question falls to be determined by the general law. On the death of a customer his funds in the bank vest in his legal representative and any cheque issued by him and not cashed before his death cannot be cashed thereafter. For his own order cannot operate to withdraw any part of the Funds which have already vested in his legal representative. But if the bank pays his cheque before it has had notice of his death, the payment is valid¹. Where one of two or more customers or partners on a joint account dies the survivors or survivor can still draw on the account. But it is preferable that, where to the knowledge of the banker a partner dies, the old account should be operated only for the purpose of winding up the partnership and arrangements should be made for a new account, carrying over to it any balance remaining².

In the case of death of one of two or more trustees, however, the bank must not honour cheques on the trust account drawn by the survivor or survivors unless it is satisfied that such survivor or survivors have the power so to draw under the terms of the trust.

(3) *By the customer's insolvency or where the customer is a company by the liquidation of the company*—On receiving notice of an order of adjudication or the presentation of a petition for adjudication of the customer or of any act of insolvency committed by the customer the bank should stop payment of all cheques issued by the customer. The reason is that under the Presidency Towns Insolvency Act, insolvency commences from the date of the earliest Act of Insolvency and under the Provincial Insolvency Act, it commences from the date of the presentation of the petition. In the case of insolvency under the Presidency Towns Insolvency Act, therefore, a bank will not be justified in paying cheques issued by a customer after the bank has notice of any act of insolvency committed by the customer.

If it does the official assignee can claim back the money so paid since the official assignee is entitled to all the property of the insolvent as from the date of insolvency. In the case of insolvency under the Provincial Insolvency Act, a bank will not be justified

¹ *Roger vs Ladbroke* (1822) 1 Bing 93, *In Re Beaumont*, (1902) 1 Ch 889, 894

² *Re Bourne*, (1906) 2 Ch 427

in paying the cheque of a customer after it has notice that a petition for adjudicating the customer insolvent has been presented. Where the customer is a company all the property of the company will vest in the liquidator, in case the company is wound up, as from the date of the order for winding up. Hence the bank should not pay the cheques of the company after it has notice of the winding-up order.

(4) *By notice of the customer's lunacy*—Where a customer is adjudged a lunatic by a competent court, the bank must stop payment of all cheques issued by the lunatic from the date on which the bank receives notice of the order of the court¹.

(5) *By service of a garnishee order or attachment or injunction in respect of the funds of the customer*—A garnishee order is an order made against a third party with whom a defendant against whom a decree has been passed has money or other property requiring him to pay over the money or the property to court. A garnishee order against the bank is generally made in the following manner. The money belonging to the customer is attached first. Then the decree holder makes an application before the court which has ordered the attachment for an order against the bank to pay the attached money to court. The notice or summons of the application is then served on the bank requiring it to show cause why the order should not be made against it. Where the bank has any reason to oppose the order e.g., where it claims a lien over the money or where it states that it has not got any money belonging to the customer, it appears before the court and opposes and if the court is satisfied that the bank's objection is justified it will not make any order. If the bank shows no cause an order is made in due course. An attachment is effected by serving the bank with a prohibitory order forbidding it to deal with the money attached without further orders.² Sometime the court before which a suit has been instituted against the customer may pass an injunction against the customer restraining him from withdrawing the money lying with the bank. In all cases where there has been a garnishee order or attachment against the bank or an injunction passed

¹ 1 *Drew vs. Nunn*, (1879) 4 Q.B.D. 661 ; *Daily Telegraph Newspaper Co. Ltd. vs. Longlin*, (1904) A.C. 776.

² Chap. XVIII, r. 1 of the Calcutta High Court Original Side Rules.

against the customer and the bank has notice of it, the bank must stop paying the customer's cheque and the bank cannot even pay a cheque drawn prior to such order.¹ In the case of a garnishee attachment the bank will be liable to pay over again to the creditor of the customer if it pays out the attached money to the customer in violation of the garnishee attachment.² But only those funds of the customer, which have become due or are accruing due at a definite and certain approaching date, can be attached by way of a garnishee order.³ Hence an amount paid in by the customer subsequent to the garnishee attachment for which a new account was opened is not affected by the attachment.⁴ The following sums are not attachable by way of garnishee: (a) a deposit account repayable only on production of the receipt (b) a deposit account repayable on fixed notice which has not been given.⁵ The following are attachable: (a) a current account, (b) a deposit account repayable on demand, (c) a deposit account repayable on fixed notice which has been given, (d) a deposit account repayable at a fixed future date or after the lapse of a specified time.⁶

(6) Where notice has been given either by the customer or the bank closing the account of the customer. In the absence of any agreement either the customer or the bank can close an account by notice to the other. But a bank is not entitled to close an account and dishonour cheques drawn on it without having given a reasonable notice to the customer.⁷ A bank may, however, at the time of the opening of an account stipulate that it can close the account at any time without notice to the customer and such a stipulation is not invalid.⁸

(7) Where the bank has been notified by its customer about the loss of a cheque.

¹ *Rogers vs. Whitley*, (1842) A.C. 118.

² *Edmuds vs. Edmuds*, (1904) P. 362.

³ *Jones vs. Thompson*, (1858) 27 L.J.Q.B. 234.

⁴ *Heppinstall vs. Jackson*, (1939) 2 A.E.R. 10.

⁵ *Halsbury's Laws of England*, Vol. I, p. 588.

⁶ *Ibid.*

⁷ *Buckingham & Co. vs. London Midland Bank*, (1895) 12 L.T.R. 70; *Agra and Masterman's Bank Ltd. vs. Hoffman*, (1864) 34 L.J. Ch. 285; *Thomas vs. Howell*, (1874) L.R. 18 Eq. 198; *Perry vs. Halifax Commercial Banking Co.*, (1901) 1 Ch. 188.

⁸ *Champion Automobile Ltd. vs. T. N. and Q. Bank*, (1938) Mad. 77.

Accounts :

In the matter of opening accounts for customers a bank usually insists on certain formalities being observed, for a banker incurs certain liabilities to its customer as well as to strangers in the matter of paying cheques or drafts for and on behalf of their customers. In the first instance the bank requires from a new customer, proposing to open an account, some form of introduction either by reference to some person known to the manager of the bank or to some other bank. The bank then makes confidential enquiries regarding the customer from such person or bank. If the bank is satisfied regarding the standing of the customer, the bank agrees to open the account. The next step is for the bank to obtain the specimen signature of the customer or any other person who is to operate on the account. Then the customer is given a cheque book containing a number of cheques which he will be entitled to use to draw on the account. He is also given a pass book and a book containing a number of 'paying-in-slips' (popularly known in India as the Challan book). All payments to be made by or on behalf of the customer whether by cash or cheque or otherwise should be entered into one of these paying-in-slips and signed by the customer or his agent and produced before the receiving cashier at the time of paying in. The receiving cashier stamps and initials the slip and the counterfoil and returns the counterfoil to the customer which serves as an acknowledgement of the receipt of the payment by the bank.

Current Deposit and Savings Bank Account :

A current account is one on which the customer can draw by cheque or otherwise as many times in the week as he likes. A savings bank account is one which usually stipulates that the customer can draw on it by cheque only once a week. A deposit account is one in which the funds are usually kept for a fixed and long period and cannot be drawn against before it is due. A deposit account is usually of the following varieties : (a) A deposit account repayable only on production of the receipt in which case the money is not due until the production of the receipt, (b) a deposit account repayable on fixed notice in which case the money is not due until a notice has been given and the notice expires, (c) a deposit account repayable at a fixed future date, or after the lapse of a specified time in which case the money is not due until after the arrival of the fixed date or the lapse of

'the specified time. It is doubtful whether cheques can be drawn even against a deposit account repayable on demand¹. The view expressed by Mallins V. C. in favour of the validity of such cheques in *Hopkins v. Abbott*² and *Stein v. Ritherdon*³ does not seem to be sound⁴. A bank generally pays a certain rate of interest on moneys lying in savings Bank and Deposit Account but pays no interest on current deposit.

Joint Account :

When an account is opened in the name of two or more persons jointly, it is called a joint account. In the absence of any agreement cheques drawn on an ordinary joint account should be signed by all the parties in whose name the account stands.⁵ But by agreement the parties may stipulate that any one of them may draw on the joint account without the concurrence or signature of the other.⁶ In case of death of any one of the parties, the bank is justified in allowing the survivor to draw any balance standing to the joint account, even as between husband and wife, whether both or either one is entitled to draw.⁷

Partnership Account :

Where account is opened in the name of a partnership firm, it is known as partnership account. All cheques on the account must be drawn in the name of the firm and in the absence of instruction to the contrary every partner has the right to draw on the partnership account in the name of the firm.⁸ The very fact that an account has been opened in the firm's name is evidence of authority of each partner to draw.⁹ In the case of death of one or more partners the surviving partner or partners may draw on the firm account.¹⁰ But the modern practice is that on the

¹ *Re Head* (No. 2) (1894) 2 Ch. 236.

² (1875) 1 R. 19 Eq. 222 at p. 224.

³ 37 L.J. Ch. 369.

⁴ *Halsbury's Laws of England* Vol. I 588 at p. 589.

⁵ *Husband v. Davis* (1851) 10 C.B. 645.

⁶ *Marshall v. Cutwell* (1875) L.R. 20 Eq. 328.

⁷ *Halsbury's Laws of England* Vol. I 604.

⁸ *Twibell v. London Suburban Bank* (1869) W.N. 127.

⁹ *Halsbury's Laws of England* Vol. I, 604 under footnote (n) *Imperial Partnership Act* S. 17.

¹⁰ *Bickhouse v. Charlton*, (1878), 8 Ch.D. 444.

death of a partner, the partnership account should be operated on only for the purpose of winding up the partnership and the bank should insist on opening a new account with the balance, if any, remaining of the old account.¹

Accounts of Companies and Corporations :

Where a company opens an account, the bank should ascertain as to who is authorised to draw cheques on the account under the Articles and Memorandum of the Company. Usually at the time of opening the account the bank satisfies itself as to the persons entitled to draw on the account and obtain their specimen signatures. The bank is only obliged to look into the articles and memorandum of the Company in order to find out the scope and authority of the persons dealing with the Company's account. It is not bound to enquire into the regularity of the proceedings what Lord Hatherly called the 'indoor management of the company.'² If a director has the authority under articles and memorandum of the company to draw cheques on the company's account, the bank will honour cheques drawn by him and the bank will not be liable to the company if it turns out that the cheque was in fact issued for a purpose other than that of the company or that the board of directors had by a resolution limited his authority to draw cheques, unless the bank has notice, express or implied, of the same.³ But the bank must scrupulously comply with the directions given at the time of the opening of the account. Thus if the cheques on a company's account are to be drawn by at least two directors, according to the directions given, and the bank negligently and contrary to directions pays cheques signed by one of them only or signed by a new director who has no authority to draw and as to whose authority the bank makes no enquiry, the bank would be liable to the company for the amount of the cheque unless the same is paid to the creditors of the company.⁴ In such a case the bank would pay the cheques at its own risk and should the cheques be drawn in favour of persons who are not the creditors of the

¹ Halsbury's Laws of England, Vol. I, 604 at p. 605.

² Royal British Bank *vs.* Turquand, (1856) 6 E. & B. 327.

³ Houghton & Co. *vs.* Nothard Lowe & Wills Ltd., (1928) A.C. 1; Underwood Ltd. *vs.* Bank of Liverpool, (1924) 1 K.B. 775.

⁴ Liggett *vs.* Barclay's Bank, (1928) 1 K.B. 48.

company, the bank would be liable for the amount of the cheques. A payment contrary to directions is also illustrated by the case of *Bank of Montreal v. Dominion Gresham Guarantee Co.*,¹ which we have discussed before².

Trust Account :

A trust account is constituted where a trustee or trustees open an account expressly as trustees and also where the trustee opens an account in his personal name but the bank is fixed with notice of the trust either by the very nature of the account or by express notice thereof³. A trust account is one in which the person or persons entitled to the benefits thereof is or are not the person or persons in whom the legal title of the account vests. Thus if A transfers Rs. 50,000/- to B in trust for a village school, the legal title of the sum of Rs. 50,000/- will vest in B who is the trustee and the party who is entitled to the benefits of the money is the school which is called the beneficiary or the "cestui que trust". A trustee cannot use the trust money for his own benefit for any purpose other than that of the trust. Hence if an account is opened by a trustee as a trustee, the bank has express notice that the funds are trust funds, and it should refuse to honour cheques by the trustee in his own favour or for any purpose alien to the trust if that is obvious; otherwise it will be liable for conversion to the beneficiaries⁴. But difficulties arise where the trustee opens the account not as a trustee expressly. In such a case a trust is implied if the trust is obvious from the nature of the account *e.g.*, where the account is headed "Police Account," or "School Account."⁵ But an account headed "Office Account" has been held not to imply any trust, for a man may divide his account into personal and office accounts⁶. If the money belonging to a trust account is drawn out and paid into the private account of the trustee the bank is liable to make good the money so drawn out.⁷ A bank may also be held liable for wrongfully

¹ (1930) A.C. 659

² See *supra*.

³ *Plumkett v. Barclay's Bank*, (1936) A.E.R. 653.

⁴ *Ibid*.

⁵ *Exparte Kingston*, (1871) L.R. 6 Ch. App. 632.

⁶ *Greenwood Teale v. Williams Brown & Co.*, (1894) 11 T.L.R. 56.

⁷ *Re West London Commercial Bank*, (1838) 38 Ch. 364.

paying out trust moneys if it receives independent intimation regarding the trust where the trust is not obvious or the account is not an express trust account,¹ and a bank cannot obtain protection by wilfully refraining from obtaining information as to the trust character of the account.² But the bank is under no duty to scrutinise the purpose of every cheque drawn by a trustee and if it is otherwise regular it is bound to honour such cheque and it is not to be held liable for such payment.³ The bank is entitled to presume that the act of a trustee in drawing cheques for third parties is in the course of the lawful performance of his duty and honour such cheques accordingly.⁴

Where there are more than one trustee, all the trustees must jointly sign a cheque drawn on the trust account unless the terms of the trust provide otherwise and on the death of one of several trustees the bank must not honour cheques on the trust account drawn by the survivor or survivors unless otherwise provided by the terms of the trust.

Executor's and Administrator's Account :

Where an account is opened by the executor or administrator of a deceased person in respect of funds belonging to the estate of the deceased, such an account is called the executor's account or the administrator's account as the case may be. A bank must not honour cheques drawn by an executor or administrator for his own benefit or for purposes other than that of paying the debts and legacies of the deceased provided the bank has express or implied notice of the same. In this respect the liability of the bank is similar to that in relation to trust account. Where there are more than one executor or administrator, each can separately operate and draw cheques on the account unless they are forbidden to do so by the will of the deceased or the letters of administration.⁵ Hence on the death of one of several executors or administrators, the bank may pay cheques drawn by the survivor or survivors and such a payment will exonerate the bank.⁶

¹ *Bodenham vs. Hoskins*, (1852) 21 L.J. Ch. 864.

² *London Jt. Stock Bank vs. Simmons*, (1892) A.C. 201.

³ *Thompson vs. Clydesdale Bank Ltd.*, (1893) A.C. 282.

⁴ *Coleman vs. Bucks & Oxon Union Bank*, (1897) 2 Ch. 243.

⁵ *Ex parte Rigby*, (1815) 19 Ves. 463.

⁶ *Clough vs. Bond*, (1838) 3 My. & Cl. 490.

Agent's Account :

Where an agent operates an account on behalf of his principal to the knowledge of the bank, the bank must see that the agent acts within the scope of his authority and does not misuse his position. Thus where the customer of a bank who was the agent of a company and was, according to the terms of the agency, bound to use the proceeds of drafts drawn on the principal for the purpose of paying for the purchases made by him on his principal's behalf, discounted some of those drafts with the bank and paid the proceeds into his own account it was held the bank was liable for conversion and was bound to pay the proceeds of these drafts to the principal company.¹ So also where a person authorised under a power of attorney to draw cheques on the customer's account, drew and paid them into his own private account, the bank which paid and collected the cheques were held guilty of negligence and liable to pay the amount of the cheques to the customer since they had notice that the agent was using the principal's money for his own purpose.² Similarly where an agent authorised to operate on the principal's account for seeking more profitable investment used the funds to adjust his own debts to the bank, it was held that the bank was not entitled to debit the principal's account by such adjustment.³

Forged or Altered Cheques :

A cheque purported to be drawn by the customer to which the customer's name as drawer has been forged is not a cheque, but a mere nullity.⁴ A bank is supposed to know the signature of its customer and detect any imitation⁵ and if it makes any payment on such a cheque it cannot debit the customer with the amount of payment unless it can establish estoppel or adoption on the part of the customer. The real ground for the banker's obligation in this respect is not, however, his supposed knowledge of the customer's signature but the fact of his having made payment

¹ *British American Elevator Co. Ltd vs Bank of British North America*, (1919) A.C. 658

² *Rickett vs. Barnett*, (1929) A.C. 176; *Lloyds Bank vs Savory*, (1933) A.C. 201, 229.

³ *Imperial Bank vs. Mary Victoria*, (1936) P.C. 193

⁴ *Imperial Bank of Canada vs Bank of Hamilton*, (1903) A.C. 49.

⁵ *Smith vs Mercer*, (1815) 6 Taunt, 76.

without the authority of the customer.¹ But if a man knows or has reasonable ground for believing, that his signature has been forged to a cheque, and that it is about to be presented to his bank for payment, he must warn the bank. If he fails to do so and the bank's position is thereby prejudiced, *e.g.*, where the bank loses the opportunity of protecting itself against subsequent forgeries, if any, or the opportunity of taking proceedings, civil or criminal, against the forger as by his escaping out of the jurisdiction, he will be held to have adopted the cheque and estopped from denying that the signature is his own.² Mere silence, however, of the customer without the bank's position being prejudiced as above does not create estoppel or constitute adoption.³ Nor would it work estoppel if the customer consciously pays a cheque to which his name has been forged and disputes a subsequent forgery by the same person unless a repetition of such payment establishes a course of business authorising the use of his name by the forger.⁴

As regards cheques originally issued and signed by the customer but which have been subsequently altered by forgery, the position is different and there are conflicting decisions on the law. Material alterations may be of various kinds *e.g.*, the amount may be altered or a crossing may be obliterated or an order cheque may be made into a bearer cheque. In India a bank paying a cheque which has been materially altered is absolutely protected under the following conditions⁵ : (1) where the alteration is not apparent or in the case of an alteration which takes the form of obliterating an original crossing and the original crossing is not apparent and (2) where the bank pays, according to the apparent tenor of the cheque. But where the alteration is apparent or noticeable on a reasonable scrutiny the bank is liable for any loss suffered by the customer by such alteration unless there is a breach of any duty owed by the customer to the bank caused by the neglect of some usual or proper precaution.⁶ The Privy Council recognised in

¹ *London River Plate Bank vs. Bank of Liverpool*, (1896) 1 Q.B. 7

² *M'Kenzie vs. British Linen Co.*, (1881) 6 A.C. 82.

³ *M'Kenzie vs. British Linen Co.*, (1881) 6 A.C. 82.

⁴ *Morris vs. Bethell*, (1869), L.R. 5 C.P. 47.

⁵ *Negotiable Instruments Act*, S. 89.

⁶ *Mercantile Bank of India vs. Central Bank of India*, I.L.R. (1938) Mad. 360 (P.C.).

*Colonial Bank of Australasia vs. Marshall*¹ that the customer owes a duty to the bank but this duty has never been defined. In that case the Privy Council held that a customer is under no duty to fill up a cheque in such a way as would not facilitate forgery e.g., leaving spaces so that the forger can utilise it and overruled the old decisions *Young vs. Grote*² and *Marcussen vs. Birkbeck Bank*³ which held a contrary view. But in a later decision by the House of Lords in *London Joint Stock Bank vs. Macmillan*,⁴ the old view in *Young vs. Grote* has been affirmed and the decision of the Privy Council in the above case has been dissented from and it has been held that a customer is bound to exercise reasonable care to prevent his banker from being misled and if in breach of such duty, he draws a cheque in a manner which facilitates fraud he is responsible for the loss and direct consequence of his act. The latest Privy Council decision in *Mercantile Bank of India vs. Central Bank of India* has not defined the duty of a drawer in drawing cheques as it was not a case of a cheque. But what it decides is that even where there is a duty owed by the drawer a mere breach of it will not exonerate the bank unless it is also proved that such a breach was the result of neglect of some usual or proper precaution. From this mass of conflicting decisions one thing is clear that so far as India is concerned the law as laid

down by the Privy Council in the case of *Colonial Bank of Australasia* is still binding in spite of the decision of the House

of Lords to the contrary in the above case until it is upset by another decision of the Privy Council. But the Privy Council recognises even in this case that the customer owes a duty to the bank and it is submitted that such a duty consists in not doing something which would proximately and directly cause a loss to the bank. The duty is purely negative and the customer need not do anything positive to prevent forgery or fraud for in the words of the Privy Council, people are not supposed to commit to forgery. Thus if a man draws a blank cheque and leaves it in a public place whence it is taken by a forger who fills up the cheque and cashes it the bank will probably not be liable for the customer

¹ (1906) A.C. 559 at 567.

² (1827) 4 Bing. 253.

³ (1859) 5 T.L.R. 179, 463 and 646 (C.A.).

⁴ (1918) A.C. 777.

⁵ I.L.R. (1938) Mad. 360 (P.C.).

did not do something which he was under a duty to do, namely, not leaving a blank cheque in a public place without taking the usual and proper precaution against it being lost

It should be noticed, however, that in any event where the alteration has the effect of increasing the amount paid, the bank can always charge the customer with the original amount and the dispute is in every case regarding the excess¹

Payment of Drafts :

A banker's draft is an order addressed by one bank to another or by one office of a bank to another office of the same bank to pay a specified sum to the payee named or his order. But a branch office of a bank cannot issue a draft payable to bearer on demand on the head office or another branch of the same bank and *vice versa*.² Hence drafts between two branches or a branch and head office of the same bank must be issued payable to the payee or order. Where any such draft is drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course.³ We have already explained what is implied by payment in due course and what would not amount to payment in due course. The bank will not be liable if it pays on a forged indorsement so long as the indorsement is regular and there is nothing to suggest any suspicion. Such drafts cannot be regarded as cheques since the drawer and the drawee are in law the same. Hence they cannot be crossed. But the protection against liability for payment on forged endorsements as indicated above makes hardly any difference for the bank as to whether they are crossed or not. Even if such a draft bears any crossing the bank must pay it across the counter on presentment provided it is duly endorsed.⁴ If the bank refuses to pay the holder can sue the bank either as drawer of a bill or maker of a promissory note.⁵

Drafts drawn by one bank on another are to be regarded as cheques and the law relating to their payment by the drawee bank

¹ Imperial Bank of Canada *vs* Hamilton, (1903) A.C. 49.

² S. 31 of the Reserve Bank of India Act.

³ S. 85A of the Negotiable Instruments Act.

⁴ Halsbury's Laws of England, Vol. 1, pages 612, 613.

⁵ *Ibid*, p. 613.

is the same as in the case of cheques which we have discussed before. Such cheques may be crossed and it so they can be paid only when presented by a bank.

Payment of Bills of Exchange Accepted Payable at a Banker's :

"Where a customer accepts a bill payable at his banker's it constitutes an authority to the banker to pay it at maturity and if no funds are available, amounts to a request for an overdraft, the banker is under no obligation to pay the bill, even though he has sufficient funds in hand¹. The bank can charge the amount of the bill on the customer if the bill is payable to bearer and the bank pays the bearer in due course. A bill of exchange is payable to bearer if it is stated to be so or endorsed in blank² or if the payee is fictitious. But if the acceptance of the customer is forged the bank cannot charge the customer with the amount of the bill on the same principle as that by which a customer cannot be charged with the amount of a cheque to which the customer's signature has been forged unless the customer is precluded from denying his signature by estoppel or adoption. We have already discussed the principle of estoppel and adoption. A bank is also not entitled to charge the amount of the bill on the customer if the bill is payable to order and payment has been obtained on forged endorsement of the payee's name even if the payment has been made in due course. S. 82 (1) of the Negotiable Instruments Act protects a bank only when it pays a bearer bill in due course and in the case of no other bills. Hence it is safe for a bank to insist on bills payable to order being presented through a bank for payment.

Collection of Cheques :

One of the principal duties of a bank is to collect cheques drawn on other banks and paid in by its customers for collection. While discharging this function it is known as a collecting bank as distinguished from a drawee bank on which the cheques are

¹ Halsbury's Laws of England, Vol. I, p. 614.

² S. 82 (c), Negotiable Instruments Act.

³ Ibid.

⁴ Bank of England *vs.* Vagliano, (1891) A.C. 107.

⁵ Ibid.

drawn. In this respect the bank is "a mere agent or conduit pipe to receive payment of the cheque from the bank on which it is drawn and hold the proceeds at the disposal of the customer".¹ As such agent its duty is to present any cheque, paid in by its customer, for payment with reasonable diligence *i.e.*, within a reasonable time. It has been held that the reasonable time would be presenting the cheque within one day after the receipt thereof where the cheque is drawn on a bank in the same place² or forwarding or presenting it on the day following the receipt thereof where the cheque is drawn on a bank in another place.³ After the expiry of a reasonable time the customer paying in the cheque for collection is entitled to presume that the cheque has been collected and the proceeds thereof have been credited to his account. The customer can, therefore, draw a cheque for an amount not exceeding the amount to be collected after the expiry of such reasonable time. If the bank has failed to collect the cheque in the meantime it cannot dishonour the cheque on the ground of shortage of funds; for there would not have been any shortage had it fulfilled its duty in collecting the cheque promptly. If it dishonours the cheque on this ground the customer can recover damages for wrongful dishonour.⁴ If the Bank makes delay in presenting the cheque, the bank will also be liable to the customer for any other loss which the customer may sustain by reason of such delay.⁵ Thus the customer pays in a cheque for Rs. 1000/ drawn by X on another bank Y. At the time the cheque is paid in and a reasonable time after that X has sufficient funds in Y. But the Bank does not present the cheque within a fortnight from the date of paying in. Bank Y fails before the cheque is presented. The customer cannot make X liable.⁶ Therefore the bank must pay for this loss to the customer. It should be noted, however, that where a collecting bank forwards a cheque drawn on a bank in another place for collection, it may forward it either to its own branch or to an agent in that place. In that case the

¹ Halsbury's Laws of England, Vol. I, p. 590.

² *Alexander vs. Burchfield*, (1842) 7 Man. & G. 1061; *Rickford vs. Ridge*, (1810) 2 Camp. 537; *Forman vs. Bank of England*, (1902) 18 T.L.R. 339.

³ *Hare vs. Henty*, (1861) 10 C.B. (N.S.) 65; *Heywood vs. Pickering*, (1874) L.R. 9 Q.B. 428.

⁴ *Forman vs. Bank of England*, *supra*; 5, *Lubbock vs. Tribe*, (1838). 3 M. & W. 607, per Lord Abinger, C.B. at p. 612.

⁵ S. 84 of the Negotiable Instruments Act [Illustration (a)].

branch or the agent has one day after the receipt of the cheque in which to present the cheque and the reasonable time will not expire after one day after the receipt of the cheque by the collecting bank but after one day after the receipt thereof by such branch or agent.¹ But the collecting bank will be liable in case of delay in presentment by such branch or agent. Presentment need not be actual presentment on the drawee bank but presentment by a recognised clearing house or by post is sufficient.² A non-clearing bank may present through a clearing bank.

When a cheque paid to a collecting bank is dishonoured on presentment, the collecting bank must give due notice of dishonour to the customer. The bank usually conveys the notice of dishonour by returning the cheque to the customer which is deemed a sufficient notice of dishonour, if the customer has indorsed it.³ The bank can also debit the customer with the amount of the cheque if it credited his account with the amount prior to collection.

A customer can draw cheques on the amount of the cheque paid in for collection only after the expiry of a reasonable time necessary for the bank to collect the cheque and complete the necessary book keeping entries. We have already seen what is to be regarded as reasonable time for presentment. But some more time will be necessary between the presentment of the cheque upto the time when the proceeds of the cheque will be available for drawing against for the purpose of collecting the proceeds and crediting them to the customer's account at the collecting bank and to complete the necessary book keeping entries. This time will vary according to circumstances. Thus more time will be necessary for a Calcutta bank to collect the proceeds of a cheque drawn on an Ambala Bank and to make them available for a customer than will be the case when the paying or drawee bank is a Calcutta bank. What will be the reasonable time after which a customer will be entitled to draw against a cheque paid in for collection is to be decided by the facts and circumstances of

¹ *Prideaux vs. Criddle*, (1864) L.R. 4 Q.B. 455.

² *Reynolds vs. Chettle*, (1811), 2 Camp 596.

³ For rules regarding notice of dishonour see *Supra* Negotiable Instruments Act.

⁴ *Marzetti vs. Williams* (1830), 1B & Ad. 415.

each case. But where a customer is credited with the amount of a cheque paid in for collection prior to the receipt of payment in respect thereof, the customer is at once entitled to draw on it¹. The bank is, however, entitled to debit the amount if the cheque is subsequently dishonoured on presentment².

Liability of a Collecting Bank to Third Parties :

A collecting bank incurs liability to a third party who is the true owner of the cheque in case the customer on whose behalf it collects the cheque happens to have no title or a defective title therein. The true owner has only to prove that the customer on whose behalf the collecting bank was acting was not the true owner and had no right to receive payment in respect of the cheque. Such a situation arises where the customer obtained the cheque from the drawer or holder by means of fraud or an offence e.g., theft or where he obtained the same by endorsement or delivery from a person who so obtained it unless he is a holder in due course or the person from whom he obtains it is himself a holder in due course. But even a holder in due course acquires no title where he obtains the cheque by virtue of a forged indorsement by the thief or forger. Thus in all cases except theft or forgery a bonafide holder for value without notice will acquire a valid title as against the true owner. In cases of theft a holder in due course will not acquire a valid title unless the cheque has been perfected so as to be transferable by mere delivery e.g. when a cheque is payable to bearer or indorsed in blank³. But in the case of a forged indorsement or a forged cheque the cheque is never perfected and forgery cannot confer title even to a holder in due course.⁴ In collecting uncrossed cheques the bank is liable to the true owner for the value of the cheque if the customer has no title or a defective title thereto. The liability arises in conversion which means a civil wrong or tort consisting of depriving a true owner of his property⁵. But

¹ *Capital & Counties Bank vs. Gordon* (1903) A.C. 240 per Lord Lindlay at p. 249.

² *Ibid.*, at p. 248.

³ S. 58 of the Negotiable Instruments Act.

⁴ *Raphael vs. Bank of England* (1855) 17 C.B. 161.

⁵ For a holder in due course see *Supra* Negotiable Instruments Act.

⁶ *Capital and Counties Bank vs. Gordon* (1903) A.C. 210, *Fine Art Society vs. Union Bank of London* (1886) 17 Q.B.D. 705.

in the case of crossed cheques a collecting bank enjoys certain amount of protection. The Negotiable Instruments Act,¹ lays down that a banker who in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment. A banker is to be deemed to receive payment of a crossed cheque even if he credits the customer's account with the amount of the cheque before receiving payment thereof. It is clear that this protection is only limited and a collecting bank will be protected only if it brings itself within the following conditions, namely, (1) that it should act in good faith and without negligence in collecting the cheque, (2) that it should receive payment for a customer as a mere agent and not of its own right as a holder, (3) that the person for whom it acts must be its customer and (4) that the cheque should be crossed generally or specially to the bank. Let us examine these conditions separately.

(1) Good Faith and Want of Negligence :

The protection granted to a collecting bank is only available when the bank exercises due care and caution in the matter of collection, the want of which necessarily implies negligence and absence of good faith. It is no defence for the bank that the defective title could not have been discovered even with the exercise of due care, for any person who does not exercise reasonable care is outside the protection altogether.² Whether a collecting bank has taken reasonable care or has been negligent or not is a question of fact and has to be determined by the facts and circumstances of each case. But the test seems to be "whether the transaction of paying in any given cheque, coupled with the circumstances, antecedent and present, is so out of the ordinary course that it ought to arouse doubts in the banker's mind and cause him to make enquiry".³ Thus the very nature of the cheque may sometimes cast doubt as to the title of the customer and the

¹ S. 131.

² *Savory & Co. vs. Lloyds Bank*, (1932) 2 K.B., on appeal (1933) A.C. 201.

³ *Commissioners of Taxation vs. English etc. Bank Ltd.*, (1920) A.C. 683, 688.

bank must make inquiries and if it receives payment without making such inquiries it will be liable to the true owner. Cases of this kind occur frequently when agents known to be such or appearing to be such from the terms of the cheque pay in the cheque to their own private accounts. Thus where the secretary of a company indorsed a cheque payable to the company and paid it into a private account, it was held that the banker ought to have made inquiries as to his authority to do so before receiving payment on his behalf.¹ This would be so even if a manager of a company is authorised to draw cheques on the company's bankers where the circumstances may indicate that the manager is exceeding his authority. Thus where the Chief accountant of the plaintiff's branch in Bombay authorised to draw cheques on their bankers, fraudulently drew a number of cheques in favour of his own bankers, namely, the defendants who collected and credited the proceeds to his account, it was held that the defendants were put on inquiry by the fact that large sums of money which could not be attributed to his salary were being transferred to them by a person who to their knowledge was an agent of the plaintiff and they were liable to the plaintiffs for having received payment on the cheque without making the necessary inquiries. A similar view was taken by the House of Lords in *Midland Bank v Reckitt*² which contains an admirable and exhaustive statement of the law as to the liability of a collecting bank in this respect. There the plaintiff who went abroad employed a solicitor as his agent giving him a power of attorney to sign cheques on his account, without restrictions. The solicitor indorsed some of the cheques payable to the plaintiff in favour of the defendants in order to reduce his overdraft account. It was held that the defendant bank were put on inquiry by the very nature of the cheques which showed that the money was not the money of the customer and that they were negligent in collecting the cheques without proper inquiry. In the same way a collecting bank would be liable if it collects cheques payable to rates collectors' secretaries of companies or charitable institutions, and the like, under their official denominations or to a partnership in the firm's name or to

¹ *Hannan's Lake View Central Ltd vs Armstrong & Co* (1900), 16 T.L.R., 236

² *Lloyds Bank vs. Chartered Bank* (1929) 1 K.B. 236.

³ (1933) A.C. 1.

executors as such and credits them without due inquiries to the private accounts of individuals indorsing them in their representative capacity¹ Similarly a *per pro* indorsement would put the bank on inquiry and collection of a cheque so indorsed without necessary inquiries would constitute negligence. The necessary inquiries must not only include the authority to indorse but also the authority to pay in and collect the cheque in the manner proposed.² A collecting bank may, however, be relieved of liability even in the absence of reasonable care if the true owner is, by his conduct, estopped from denying the validity of the payment or deemed to adopt the payment. Thus in *Morrison v. London County and Westminster Bank*³ the facts were as follows. The manager of the plaintiff having authority to sign *per pro* drew cheques so signed for a number of years and paid them fraudulently into his private account with the defendant bank who collected the same. It was held that as regards the earlier cheques the defendants were negligent in as much as they had notice of the agency but nevertheless they were held not liable as on the fact it appeared that the plaintiff adopted the earlier transactions. As regards the later cheques it was held that the defendants were not negligent as the plaintiff by adoption of the earlier transactions led them to believe that the dealings of the manager were authorised and valid. We have already discussed the requisites of estoppel and adoption in connection with payment of cheques.

Apart from the case of negligence in collecting cheques for others paying in the same fraudulently or without authority there may be other instances of negligence which would make a collecting bank liable to the true owner. Thus if a bank collects a cheque crossed account payee for a customer who is on the face of the cheque not the payee then the bank would be liable in the absence of proper enquiries.⁴ Omission to detect an irregularity in the indorsement would also amount to negligence.⁵ Absence of inquiry about a new customer opening an account or to follow up

¹ *Bevan v. The National Bank* (1906) 23 TLR 65

² *Bissel v. Fox*, (1885) 53 LT 193

³ *Gompertz v. Cook* (1903) 20 TLR 106

⁴ (1914) 3 KB 356

⁵ *House Property Co v. London County and Westminster Bank* (1915) 84 I JKB 1846

⁶ *Bavins Tuner and Sims v. London and South Western Bank* (1900) 1 QB 270

a reference given by such customer would also constitute negligence. Thus in *Hampstead Guardians v. Barclays Bank*¹ a person opened an account with the defendant bank with a cheque stolen by him representing that he was the payee thereof. He gave a fictitious address and the bank could by consulting the directory have ascertained that no person of such name was living there. It was held that the bank was negligent.

(2) Receipt for Customer :

A collecting bank can claim protection only if it receives payment as the agent of its customer *viz.* as a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for then customer. A bank does not cease to be such an agent by the mere crossing or crossed cheques it can before receipt of payment. But when a bank becomes a transferee of the cheque for value it ceases with the cheque that but for a forged indorsement it would become the owner thereof, the bank does not collect the cheque for the customer but for itself and in such a case the bank will be liable to the true owner if the title to the cheque proves to be defective even in the absence of negligence. The bank becomes a transferee of the cheque for value and ceases to be agent for the customer if it pays cash for the cheque to the counter or if the cheque is paid in on the express understanding that it may be drawn against it once, whether it is actually drawn or not or if the cheque is paid expressly for the reduction of an overdraft. But the mere existence of an overdraft for which the bank would have a lien over the cheque paid in, making the bank a holder for value to the extent of that lien would not take away the protection from the bank.²

(3) Customer :

We have seen already that a collecting bank can claim protection

¹ (1923) 39 T.L.R. 229

² *Capital and Counties Bank v. Gordon* (1903) A.C. 240 per Lord Macnaghten at pp. 245, 246

³ S. 131 of the Negotiable Instruments Act

⁴ *Capital and Counties Bank v. Gordon*, *Ibid.*

⁵ *Royal Bank of Scotland v. Tottenham* (1894) 2 Q.B. 715, In *Re Farrows Bank* (1923) 1 Ch. 41, 49

⁶ *Clark v. London and County Bank* (1897) 1 Q.B. 552, *Suttons v. Briggs* (1922) A.C. 1, 17

tion only if it receives payment for a customer. Therefore it becomes very important to appreciate what is actually signified by the word 'customer'. A customer has been defined as a person having habitual dealings with the banker in the nature of ordinary banking business"¹ It necessarily implies a person who has the use and habit of resorting to the bank to do business. Hence an isolated transaction *e.g.* collecting a cheque for a stranger would not constitute that person a customer.² Nor would a person who had been continually cashing crossed cheques across the counter for a number of years be deemed a customer.³ It was pointed out by Lord Davey in *Great Western Rail Co. v. London and County Banking Co.*⁴ that there must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer of a banker. In a recent case decided by the House of Lords⁵ the question which came up for decision was whether a person was a customer in view of the fact that he opened an account only two days prior to the paying in of the disputed cheque. Lord Duncannon in his judgement observed as follows: "the word 'customer' signifies a relationship in which duration is not of the essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques upto the amount standing to his credit is a customer of the bank, irrespective of whether his connection is of short or long standing." But it is submitted that if the account is opened with the disputed cheque the person paying in the cheque will not be regarded as a customer at the time he pays in and the bank will be liable in case the title to the cheque rests with someone else. As Darling J. observed in *Tate v. Wilts and Dorset Bank*,⁶ "He was not a customer at the moment, but he was going to become a customer if the cheque was collected." It seems that the distinction is not between a habitual customer and a new one but between one for whom the bank renders a casual

¹ Halsbury's Laws of England, Vol. I, p. 595, 596

² *Mathews v. Burn & Co* (1894), 10 T.L.R. 386.

³ *Great Western Rail Co. v. London & County Bank Co.*, (1901) A.C. 414.

⁴ *Ibid.*

⁵ *Commissioners of Taxation v. English, Scottish & Australian Bank* (1920) A.C. 683.

⁶ (1899) *Journal of Institute of Bankers*, Vol. XX, p. 376, per Darling J.

service *e.g.*, cashing a cheque for the first time for the purpose of opening an account or for obliging him or someone else and a person who has an account of his own at the bank.

(4) Crossing :

A collecting bank can claim protection only if the cheque paid in for collection is crossed generally or specially to itself.¹ If it was not crossed at the time it was paid in the bank, the bank cannot acquire the protection by crossing an uncrossed cheque specially or generally.²

Bank's Liability as a Holder in Due Course :

We have already seen that except in the case of forged indorsements and theft of a cheque not perfected (*i.e.*, a cheque which has to be indorsed for negotiation) a holder in due course acquires a valid title. Hence where there is no question of forged indorsement, a collecting bank may escape liability if it can establish an independent title to the disputed cheque as a holder in due course excepting where the cheque is crossed 'not negotiable'. Thus it was held in *Gordon's case* that a bank collecting a bearer cheque can escape liability if it is a holder in due course. But in *Great Western Rail. Co v. London and County Banking Co.*⁴ it was held that a cheque crossed "not negotiable" cannot be obtained by a bank as a holder in due course since such a cheque cannot be negotiable and the bank cannot escape liability on that ground. The bank will be regarded as a holder in due course in the following cases (a) where the bank pays cash for the cheque over the counter,⁵ (b) where the cheque is paid in expressly in reduction of an overdraft,⁶ (c) where the cheque is paid in on express condition of being at once drawn against, and is so drawn against,⁷ (d) where the cheque is paid in subject to a lien in favour of the bank,⁸ and (e) where an uncrossed cheque is paid in and credited

¹ For general and special crossing see Negotiable Instruments Act SS. 124, 125, 126.

² *Capital and Counties Bank v. Gordon* (1903) A.C. 240.

³ *Capital and Counties Bank v. Gordon* (1903) A.C. 240.

⁴ (1901) A.C. 414.

⁵ *Halsbury's Laws of England* Vol. 1, p. 592.

⁶ *London and County Bank v. Groome* (1881), 8 Q.B.D. 288.

⁷ *National Bank v. Silke* (1891) 1 Q.B. 435, 439.

⁸ *Ibid.*, 620.

as cash at once¹ If a bank becomes a holder in due course of any cheque paid in for collection as in any of the abovementioned cases, it has all the rights of such holder and can sue the parties to it, namely, the drawer and all the subsequent indorsees in its own name in case the cheque is dishonoured on presentment.

Collection of Bills of Exchange :

A bank is not under any duty to collect bills of exchange for its customers. But if it undertakes to collect a bill for customer, it must present the bill for acceptance and payment in accordance with the provisions of the Negotiable Instruments Act² and to give notice of dishonour to the customer in case the bill is dishonoured. This is necessary in order to enable the customer to give notice of dishonour within a reasonable time to the parties he wants to make liable thereon. It has already been noticed that the holder of a bill must give notice of dishonour to the parties he wants to make liable within a reasonable time³ and in default he may not be able to hold such parties liable. Therefore the bank will be liable to the customer for any loss he may incur as a result of the bank failing to present the bill and to communicate notice of dishonour in due time.

A bank which collects a bill for its customer, to which the customer has no title, is liable to the true owner for conversion. It does not enjoy the protection which is available to it in the collection of crossed cheques⁴ but where the bank becomes a holder in due course of bills given to it for collection it will not be liable to the true owner excepting in the case of forged indorsements. A bank will become a holder in due course of a bill payable to bearer by the mere delivery thereof provided (a) the bank pays cash across the counter or (b) the bill is given expressly in reduction of an overdraft, or (c) the bill is given on the express condition of its being drawn against at once or (d) the bill is paid in subject to the bank's lien or (e) the bill is discounted. In the case of a bill payable to order the bank will be a holder in due course if it is indorsed to the bank and paid in under any one of the conditions mentioned above.

¹ *Capital and Counties Bank vs Gordon, Supra*

² See Negotiable Instruments Act *Supra*

³ S. 94 of the Negotiable Instruments Act

⁴ *Arnold vs. Cheque Bank (1876)*, 1 CPD 578 at 585.

Collection of Bankers' Drafts :

Drafts drawn by one office of a bank on another office of the same bank are not cheques since the drawer and the drawee are, in the eye of law, the same person. They cannot, therefore, be crossed and even if they are ostensibly crossed, a bank collecting them for its customer would not enjoy the protection which would be available to it if they were crossed cheques. Hence a collecting bank receiving payment in respect of such drafts for its customer who has no title to them would be liable to the true owner for conversion. But a draft drawn by one bank on another is a cheque and may be crossed and dealt with as such.¹ Therefore a collecting bank receiving payment in respect of a crossed draft drawn by one bank on another would enjoy the same protection as against the true owner as would be available to it in the matter of collecting crossed cheques.

The Bankers Lien :

A banker may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods deposited with him by a customer if the customer is indebted to the bank on such a general balance of account.² This right to retain the property of another for a general balance of account is known as a *general lien* as opposed to a *particular lien* e.g., that of an artificer for his charge on account of labour employed or expenses bestowed upon the identical property retained.³ This general lien was originally established in England, as regards bankers and others, as a proved usage of trade and at once became a part of the law of merchant as judicially recognised.⁴ A banker's lien extends to all bills and cheques paid in for collection and to all securities deposited with the banker by a customer (including share certificates,⁵ a pay order,⁶ a policy of insurance,⁷ and a lease⁸) or by a third person on a customer's account and to money paid in by, or to the account of a customer, unless there be a contract.

¹ Halsbury's Laws of England, Vol. 1. p. 602.

² S. 171 of the Indian Contract Act.

³ Kent, Commn. ii. 634.

⁴ *Brandao vs. Barnett* (1846) 12 Cl. & F. 787.

⁵ *Re United Service Co., Johnston's Claim* (1871), 6 Ch. App. 212.

⁶ *Misa vs. Currie* (1876) A.C. 564.

⁷ *Re Bowes* (1886), 33 Ch. D. 586.

⁸ *Mutton vs. Peat* (1900) 2 Ch. 79.

express or implied, excluding the lien. An agreement ^{generally} the general lien may be expressly provided for ^{or may, in other place,} as when securities are paid in to secure overdrafts ^{up to a} limit. In such a case the bank cannot claim a lien ^{for a customer,} exceeding the limit.¹ Similarly he cannot claim a ^{lien on} bills which are paid in specifically for providing ^{for} cheques drawn by the customer or bills accepted by ^{on} behalf of the customer. for the bank receives such ^{cheques and credit} for a specific purpose which impliedly excludes the ^{general} lien. But it seems that the banker's lien will attach to securities ^{letter} in for a specific purpose *e.g.*, to secure an overdraft or to ^{accept} particular cheque if they remain with the bank after such ^{overdraft} if a cheque has been paid off,² though doubts have been ^{expressed} whether the bank can claim a lien on the securities in such a case.⁴

Where bills or cheques are paid into a bank, a question arises whether the bank receives them as an agent of the customer or as a transferee which makes it a holder in due course. We have already seen under what ^{circumstances} the bank will be regarded as a transferee⁵. If the bank receives them as a transferee no question of lien arises, for the bank is entitled to the whole of the proceeds. But if the bank receives them as an agent of the customer, it has a lien on them to the extent of the customer's indebtedness to the bank, if any. But where the bank has a lien it becomes a holder in due course in respect of cheques or bills or a promissory note payable to bearer to the extent of the lien⁶ and in such a case the bank can sue for the whole amount of the bill or cheque in case it is dishonoured, holding any surplus over the customer's indebtedness for the customer.

A bank receiving a cheque or bill or note from a customer must present it for acceptance or payment whether it ^{claims} a lien in respect thereof or is a transferee for value thereof.

In the absence of an agreement to the contrary whether express

¹ *Re Bowes, Supra.*

² *Early vs. Turner* (1857), 26 L.J. Ch. 710; *Mercantile Bank of India vs. Rochaldas Gindumal*, (A.I.R.) 1926 Sind, 225.

³ *Re London and Globe Finance Corporation* (1902) 2 Ch. 416 per Lord Buckley J.

⁴ *Halsbury's Laws of England*, Vol. I p. 621, Note (h).

⁵ S. 9 of the Negotiable Instruments Act.

Collection lied, a banker is entitled to combine all the different kept by the customer in the same right (*i.e.*, not in

Drafts drawn on the same bank are whether deposit or current, or whether at the same in the eye of law, different branches, and to exercise his lien on the result-crossed and ev

them for its r
be available der to be entitled to claim a lien the bank must receive bank receivables or bills on which the lien is claimed as a banker who has in the course of banking business.² Thus the bank cannot convert a lien on securities or valuables deposited with it for safe custody for it receives them not as a banker but as a bailee³. Nor can the bank claim a lien on title deeds casually left at the bank after a refusal by it to advance money on them.⁴

The banker's lien is not like the ordinary lien which is only a passive right.⁵ It gives the banker the right of a pledgee so as to enable him to sell the negotiable instruments or securities on which he has the lien in case the customer fails to repay his debts within the time fixed or where no time is fixed after a reasonable notice to the customer to pay and the failure of the customer to pay within the time fixed by the notice.⁶

Letters of Credit and Documentary Bills :

A letter of credit is a document addressed to a specified person or generally by a bank requesting the addressee, where he is specified or any person to whom it may be presented, where the addressee is not specified, requesting him to make payments or advances or extend credit (such as allowing the facility to draw cheques) to the person to whom the letter is granted upto a specified amount or intimating him that the grantee of the letter is authorised to draw bills of exchange on the bank upto a specified amount. Where the addressee is specified the letter is 'special' and where the letter is addressed to anyone to whom it may be

¹ *Garnet vs. M'Kewan* (1872) L.R. 8 Ex. 10 ; *Prince vs. Oriental Bank Corp.* (1878) 3 A.C. 325, 333.

² *Brandao vs. Barnett* (1846) 12 Cl. & F. 787.

³ *Cuthbert vs. Roberts, Lubbock & Co.*, (1909) 2 Ch. 226, C.A.

⁴ *Lucas vs. Dorrien* (1817) 7 Taunt. 278.

⁵ See lien under the Chapter on Mortgage.

⁶ *Burdick vs. Sewell* (1884), 13 Q.B.D. 159 ; *Ex parte Official Receiver* Re : *Moritt* (1886) 18 Q.B.D. 222, at p. 232.

presented, it is called "general" or "open". The letter is generally addressed to an agent of the bank or to a bank at another place. Letter of credit play a very important role in financing international trade and commerce and obviates the necessity for a customer, carrying on trade between different countries or places, to keep his funds tied up in different places.

Where the letter is a request to pay money or extend credit to the grantee, the bank becomes liable to the party so paying or extending credit on the production of the letter.¹ If the letter is special only the addressee can act on the letter and no one except the addressee can make the bank liable by acting on it. But if the letter is general any one acting on it may make the bank liable.

Where the letter simply contains an authority to the grantee to draw bills of exchange on the bank upto a specified amount, it is meant to be shown to third parties conveying the intimation to them that there is a binding contract whereby the bank will accept bills of exchange drawn on it by the grantee upto the specified amount. If any person acts on the letter *e.g.*, by discounting a bill drawn by the grantee and paying for it, he can force the bank to accept the bill and pay for it.² Where a bank grants a letter of this kind to a customer, the letter usually provides that the customer can draw bills only against actual shipments of goods, bills of lading or other documents of title and that the acceptance of bills drawn by the customer is conditional upon the forwarding of such documents of title to the bank. Any person presenting a bill, drawn by the customer on the authority of such a letter, to the bank for acceptance must, therefore, see that the documents of title reach the bank before or at the time it is called upon to accept ; for otherwise the bank will not be liable to accept the bills so presented without the documents.³ A letter of credit with a condition about documents is called a "documentary letter of credit". If such a letter of credit describes the goods against which the bills are to be drawn, it has been held that the bank

¹ *Morgan vs. Lariviere* (1875), L.R. 7 H.L. 423.

² *Maitland vs. Chartered Mercantile Bank of India, London and China* (1869) 38 L.J. Ch. 363 ; *Union Bank of Canada vs. Cole* (1877). 47 L.J. C.P. 100 at 109 ; *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867), 2 Ch. App. 391.

³ *Ex parte Brett, Re Howe* (1891) 6 Ch. App. 838, 841.

is not bound to accept the bills if the goods shipped do not correspond exactly with the description given in the letter whether they are considered to be the same in the market or not.¹

A person who acts on a documentary letter of credit *e.g.*, one who discounts a bill drawn by the customer and receives the documents or an indorsee from him, does not acquire any right or title to the goods to which the documents relate. His right is against the bank and the drawer personally.² But the bank acquires a lien and the right of a pledgee over the goods on its acceptance of the bill and the receipt of the documents.³ So if the customer fails to pay for the bill at maturity after the bank's acceptance and the bank has to pay the acceptance, the bank may realise the amount of the bill paid by it by selling the goods. But it seems that before selling the goods the bank should give notice to the customer to pay the money within a reasonable time and if the customer makes default the bank may sell the goods and realise the amount paid.⁴

Letters of credit are not negotiable. Therefore a person who pays money or extends credit to any one other than the grantee of the letter cannot recover the money so paid from the bank which issued the letter. If the grantee has paid or deposited money with the bank which issued the letter for obtaining it, he may recover any money paid wrongly or mistakenly by the issuing bank to any other person who might have obtained or used the letter by fraud or any other offence.⁵

Letters of credit which are issued to travellers in foreign countries are usually of the following varieties, namely, (1) circular letters of credit, (2) circular notes and (3) traveller's cheques.

(1) A circular letter of credit is usually in the form of a request by a bank to its agents and correspondents in foreign countries to honour the cheques and drafts of the grantee upto a specified amount which the issuing bank undertakes to honour on presentation. These letters are obtained either by paying or depositing cash to the issuing bank or giving a guarantee for the

¹ *Rayner & Co. Ltd. vs. Hambros Bank* (1942) 2 A.E.R. 694.

² *Re Barnard's Banking Co.*, (1871), L.R. 5 H.L. 157 at 167.

³ *Re Barnard's Banking Co.* *Supra*. *Ex parte Brett, Re Howe* (1871) 6 Ch. App. 838 at 841.

⁴ *Halsbury's Laws of England*, Vol. 1 p. 624, 625.

⁵ *Orr. vs. Union Bank of Scotland* (1854), 1 Macq. 513.

payment of the amount of cheques or drafts which the issuing bank undertakes to honour. A circular letter of credit is known as a guarantee letter of credit where it is obtained by the grantee by furnishing guarantee for the amount. (2) A circular note is akin to a circular letter of credit excepting that it is generally for a certain round sum in the currency of the country of the issuing bank and is accompanied by a letter of indication. (3) Traveller's cheques are akin to circular notes and are current for a fixed period and are almost always signed by the holder at the time of the issue and signed again in the presence of the person who is requested to pay at the time of payment.

Safe Custody of Valuables :

The position of a banker accepting deposits of property or valuables for safe custody is like that of a bailee¹. As such he is bound to take as much care of the goods deposited with him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same description. In the absence of any special contract his liability is not like that of an insurer as to make him liable to the owner for any loss or damage to the goods. If he takes the amount of care mentioned above he will not be liable for the loss, destruction or deterioration of the goods unless he agrees to accept for value any higher liability at the time of deposit. An acknowledgement by the banker that he receives the goods "for safe custody" does not make his liability any the higher.² He is not also liable for the criminal acts of his employees which there was no ground for anticipating.³ But if he knowingly employs a dishonest person he would be answerable for the latter's acts as in employing the latter he cannot be regarded as exercising the amount of care which is required of him. He would also be liable to the owner if he delivers the goods to a wrong person. This would be so even if he is not negligent and the goods are obtained from him by means of an order to which the owner's signature has been forged.⁴ That is why a

¹ *Giblin vs. McMullen* (1868) L.R. 2 P.C. 317; *Re United Services Co. Johnston's Claim* (1871) 6 Ch. App. 212

² S. 151 of the Contract Act.

³ *Ross vs. Hill* (1846) 2 C.B. 877.

⁴ *Chestire vs. Bailey*, (1905) 1 K.B. 237.

⁵ *Stephenson vs. Hart* (1828) 3 Bing. 476; *M'Kean vs. M'lor* (1870) L.R. 6 Ex. 36.

bank is entitled to refuse delivery of goods and retain them until it is satisfied about the identity of the person or the genuineness of the order requiring delivery where the bank is suspicious about such identity or genuineness.

Discounting Bills :

Apart from collecting and paying bills on behalf of customers, one of the most important functions of a modern bank is the discounting of bills brought to it by a customer or any one else. In performing this function a bank renders a most valuable service to the commercial world at large. The importance of this service may be illustrated by the following example. A exports 100 bales of Tibetan wool of the value of Rs. 1,00,000/- from Calcutta to B in London. Between the date on which he consigns the wool and the date on which the same reaches B and payment is realised thereon a long time may elapse during which A's money will be locked up without any chance of being invested in further business. A might have to sit idle during this time unless he has sufficient funds at his disposal. But this difficulty is obviated by the system of discounting bills by banks which is usually done in the following manner. A draws a bill of exchange on B for Rs.10,000/- payable at sight or after sight, as soon as the goods are shipped. He then goes to his bank with the bill and bills of lading and other documents evidencing the consignment of the goods. The bank, if satisfied with the genuineness of the bill, discounts the bill by paying A the amount of the bill less a certain sum which is known as the discount charge or the rate of discount and after retaining the bill of lading and the other documents. The bank then sends the bill either to its branch or an agent in London along with the bill of lading and the other documents for presenting it to B for acceptance or payment where no acceptance is necessary. On presentation of the bill to B, B takes the bill of lading and the other documents which alone would give him the right to take delivery of the goods after accepting the bill or paying for the same as the case may be.

A bank is said to discount a bill when it takes a bill at once as a transferee for value. Where the bill is negotiable by mere delivery e.g., when it is payable to bearer¹ the bank becomes a

¹ S. 47 of the Negotiable Instruments Act.

holder in due course by discounting the bill, even without the indorsement of the customer, if it takes the bill without notice of any defect in the customer's title,¹ if any, and it can sue the drawee or acceptor or the drawer of its own right. But if the bill is payable to order it can be negotiated only by indorsement and delivery and without the indorsement of the customer the bank will be merely a transferee for value and not a holder in due course. The difference between a transferee for value and holder in due course is that a transferee cannot sue on the bill in his own name, nor can he negotiate it to a third party until the transferor indorses the instrument.² The right of the transferee is like that of an assignee of the ordinary chose-in-action and if he has paid value for the transfer he acquires the right to compel the transferor from whom he has taken the instrument to put his indorsement³ which may be enforced by a suit if the transferor refuses to do so.⁴

When a bank receives a bill from a customer it is question of fact in every case as to whether the bill is taken for collection or as security for a loan or overdraft or for discount. Where the bank receives the bill for collection the bank does not become a holder in due course or transferee for value and it remains liable to the true owner of the bill in case the customer's title to the bill proves defective.⁵ But even in the case of a bill paid in for collection the bank will not be liable to the true owner if it becomes a holder in due course in respect of the bill unless the bill has been negotiated by a forged indorsement.⁶ Where, however, a bank receives a bill from a person who is not a customer the presumption is that the bill has been discounted. A bank becomes a holder in due course of a bill discounted by it by the mere delivery thereof, if it is payable to bearer, and by delivery and indorsement, if it is payable to order provided it has no notice of any defect in the title of the person paying in the cheque.⁷ If the bank is the holder of a bill in due course

¹ S. 9 of the Negotiable Instruments Act.

² *Harrop vs. Fisher*, (1861) 10 C.B. (N.S.) 196.

³ *Walter vs. Neary* (1904) 21 T.L.R. 146 ; Specific Relief Act, S.R. Illus.

⁴ *Rose vs. Sims* (1830) 1B & AL. 521.

⁵ See *Supra*.

⁶ *Capital and Counties Bank vs. Gordon* (1903) A.C. 240 ; See *Supra* for conditions under which a bank will become a holder in due course

⁷ S. 9 of the Negotiable Instruments Act.

it will not be liable to the true owner if the transferor's title proves defective except in the case of forged indorsement by the transferor or someone from whom the customer took the bill. But the bank will be liable to the true owner if it discounted a bill payable to order without a proper indorsement; for in such a case the bank will be a mere transferee for value or assignee and not a holder in due course and an assignee takes the assignment subject to all defects in the title of the assignor.

In the case of dishonour of a bill discounted by a bank for its customer, they can debit the customer's account with the amount of the bill where the customer's indorsement is on the bill. Where the customer's indorsement is not on the bill, the bank cannot debit the customer's account and has to proceed with the ordinary remedies of transferee for value.¹

A bank cannot also retain moneys due to a customer as a cover against and in anticipation of the risk of any bill discounted for the customer being dishonoured at maturity. It seems, however, that the bank can do so in the event of the customer's insolvency before the maturity of the bill.² The reason appears to be that in the event of the customer's insolvency all the properties and assets of the customer will vest in the Official Assignee or receiver as the case may be including the moneys in the hands of the bank subject to the lien of the latter, if any, existing at the moment. But the bank has no lien on the moneys for any prospective dues which the bank may have in case the bill is dishonoured at maturity. If the money is handed over to the Official Assignee or Receiver and then the bill is dishonoured the bank will have nothing to claim a lien on after the dishonour of the bill. Therefore it seems reasonable that in such a case the bank may retain a sufficient sum to cover against any prospective loss which may be caused by the dishonour of the bill.

Loans and Advances by Bankers :

One of the principal functions of a bank is to give loans and advances to customers and others out of the funds at its dis-

¹ Halsbury's Laws of England, Vol. 1 p. 629.

² *Bowen vs. Foreign and Colonial Gas Co.*, (1874), 22 W.R. 740

³ Halsbury's Laws of England, Vol. 1, 629, 630.

posal for the purpose of making profits. The loans may be given with or without security. Where loans are given on the security of mortgages in immoveable property the ordinary law of mortgage will prevail. Where loans are given on securities or negotiable instruments or other kinds of moveable property the position of the bank is like that of a pledgee.¹ It has the right to sell the goods pledged with it if the borrower fails to pay within the time fixed or, where no time is fixed, after the expiry of the time within which he is required to repay by a notice given by the bank fixing a reasonable time within which he is required to pay.²

Where a loan given by a bank is secured by documents of title e.g., a railway receipt or a bill of lading, the bank acquires the rights of a pledgee in respect of the goods to which the documents refer and does not lose such rights by parting with the custody of the documents or by entrusting them to the borrower or his agent for the special purpose of dealing conveniently with the goods e.g. for collecting them from the Port Trust and putting them into the bank's godown.³ If the borrower commits a fraud by obtaining further advances from other persons on the security of the same documents while they are given to him by the bank for such special purpose, the bank's title to the goods will not be affected by the interests of these other persons so defrauded even though such fraud would not have been committed but for the bank parting with the custody of the documents.⁴ But the bank will not be protected where it parts with the custody of the documents or carelessly leaves them with the borrower for no such special purpose and an innocent third party is defrauded thereby.

If the borrower has no title or a defective title to any security or document of title, or moveable property on the security of which a bank advances a loan, the true owner can recover such security or document or moveable property from the bank or hold it liable for damages for conversion in case it has disposed of or dealt with the same except in the following cases :—

¹ *Burdick vs. Sewell* (1884), 13 Q.B.D. 159; *Ex parte Official Receiver, Re Moritt* (1886) 18 Q.B.D. 222.

² See the Contract Act, *Supra*, for the rights of a pledgee.

³ *Mercantile Bank of India vs. Central Bank of India* (1937) 65 I.A. 75.

⁴ *Ibid.*

- (a) Where the borrower as a mercantile agent of the owner has obtained possession of the security, goods or document with the consent of the true owner and pledges the same to the bank which accepts them in good faith and without notice of the want of authority of the borrower.¹
- (b) Where the borrower having sold the goods or security continues to be in possession of the goods or security or the documents relating to the goods and pledges the same himself or through a mercantile agent to the bank which receives the same in good faith and without notice of the previous sale.²
- (c) Where the borrower, having bought or agreed to buy the goods or security, obtains possession of the goods or documents relating thereto or the security before paying the price thereof and pledges the same himself or through his mercantile agent to the bank which receives them in good faith and without notice of the seller's lien for the unpaid price.³
- (d) Where the borrower obtains possession of the goods or security under a voidable contract e.g. one tainted by fraud or duress and pledges the same before the contract has been rescinded by the true owner and the bank receives the same in good faith and without notice of the defect in the borrower's title.⁴
- (e) Where the true owner is estopped by his conduct from disputing the title of the bank.⁵

Where the bank accepts a negotiable instrument payable to bearer as security for a loan, the bank becomes a holder in due course to the extent of its lien and can realise its dues by sale or negotiation of the instrument and retain the same as against the true owner whether the borrower had any title in the instrument or not.⁶ Where, however, the bank accepts a negotiable instru-

¹ S. 178 of the Contract Act ; S. 27 of the Sale of Goods Act

² S. 30(1) of the Sale of Goods Act

³ S. 30(2) of the Sale of Goods Act .

⁴ S. 178 of the Contract Act.

⁵ S. 27 of the Sale of Goods Act ; See also the discussion under the heading estoppel.—in the Chapter on sale of goods *Supra*.

⁶ S. 9 of the Negotiable Instruments Act ; See *Supra* under the heading "Bank's liability as a holder in due course."

ment, payable to order as security for a loan the bank will become a holder in due course, if the bill is indorsed in its favour, to the extent of its lien unless the indorsement of the borrower or some other previous indorsement is forged. Where the indorsement is forged the bank will be liable to the true owner unless the bill came into the possession of the borrower under any one of the circumstances mentioned above so as to estop the true owner from disputing the title of the bank.

Pass Book :

We have already seen that a bank provides its customer with a pass book at the time of the opening of an account by the customer. The bank periodically records all the payments in as well as all the drawings out by the customer. Entries in the pass book to the credit of the customer are *prima facie* evidence against the bank and the customer is entitled to act on them e.g. by issuing cheques for the amount shown to be lying to his credit.¹ Similarly entries to the debit of the customer are *prima facie* evidence against the customer when he returns the pass book without objection. But the entries in the pass book are not in all cases conclusive and binding on the bank or the customer.² Thus credits mistakenly entered³ or fraudulently entered⁴ by a bank official cannot be relied on by the customer and rectified by the bank within a reasonable time unless the customer has acted on such entries and altered his position e.g. by issuing a cheque in favour of a third party and incurring liability thereunder.⁵ Similarly if a customer fails to notice or object to a debit entry in respect of a cheque to which his signature was forged and which was paid by the bank before he returns the pass book, he cannot be precluded from recovering the amount paid on such cheque when he comes to know of it⁶ as there is no duty cast on the customer to examine the pass

¹ Akro Keri (Atlantic) Mines Ltd. *vs.* Economic Bank (1904) 2 K.B. 465

² Shunker Das *vs.* Punjab National Bank, 62 I.C. 472.

³ Commercial Bank of Scotland *vs.* Rhind (1860) 3 Macq. 643.

⁴ Br. & N. E. Bank *vs.* Zolstein, (1927) 2 K.B. 92.

⁵ Mowji Shamji *vs.* National Bank of India, 25 Bom. 499, 515; Skerring *vs.* Greenwood (1825) 4 B & C 281, 289; Capital & Counties Bank *vs.* Gordon (1903) A.C. 240, 249.

⁶ Walker *vs.* Manchester & Liverpool District Banking Co., (1913) 108 L.T. 728.

book from time to time.¹ In the same way a bank cannot retain moneys paid in by a customer on the ground of its omission to enter it in the pass book and the failure of the customer to notice the omission or object to the same.²

It has in some cases been held that where a periodical balance has been struck in the pass-book and the customer returns the pass book without objection, the balance so struck becomes evidence of a stated and settled account between the bank and the customer.³ But the better opinion seems to be that in the absence of independent evidence of an implied or express agreement whereby the bank and the customer accept the balance so struck as constituting a stated and settled account the mere fact that such balance has been struck in the pass book without any objection being raised by the customer would not be a conclusive evidence of a stated or settled document.⁴

Special Provisions for Banking Companies :

We have already seen that the Indian Companies Act, 1913 as amended by the companies amendment Act, 1936 makes certain special provisions for banking companies for the purpose of preventing the growth and continuance of mushroom banks. We may note these provisions as follows.

Restriction in the number of Partners in a Banking Business:

No company, association or partnership consisting of more than ten persons can carry on the business of banking unless it is registered as a company under the Indian Companies Act.⁵ Any company, association or partnership carrying on the business of banking in contravention of this provision is an illegal association⁶ and cannot sue third parties on contracts made by it.⁷

¹ *Kepitagalla Rubber Estates Ltd v. National Bank of India Ltd.* (1909) 2 K B 1010.

² *Halsbury's Laws of England*, Vol 1, p 619.

³ *Blackburn Building Society v. Cunliffe Brookes & Co.* (1882) 22 Ch D 61 at 71, 77.

⁴ *Vagilano v. Bank of England* (1889) 23 Q.B.D. 243 at 243 (Court of Appeal).

⁵ S. 4(1) of the Indian Companies Act, 1913.

⁶ *Madstow Total Loss Association* (1882) 20 Ch D 137; *Naidu v. Jennings* (1918) 50 I.C. 513.

⁷ *Jennings v. Hammond* (1882) 9 Q.B.D. 225; *Senaji v. Pannaji* I.C. 300.

Every member of any such illegal association is personally liable for all liabilities incurred in such business¹ and punishable with fine not exceeding Rs. 1000/-.² In the case of joint families or partnerships consisting of two or more joint families carrying on the business of banking, the minor members are to be excluded in computing the maximum number of members allowed to carry on the business of banking without being formed into a company.³ The purpose of this provision is to bring big banking concerns under the checks and control of the Indian Companies Act so that the interest of customers dealing with these concerns may be protected.

Limitation of Activities of Banking Companies :

No company formed after the commencement of the Indian Companies (Amendment) Act, 1936, for the purpose of carrying on business as a banking company or which uses as part of its business name the word 'bank,' 'banker' or 'banking' can be registered as a company unless the memorandum limits the object of the company to the carrying on of the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or otherwise along with some or all of the forms of businesses specified in S. 277 F⁴ and no banking company whether incorporated in or outside British India, can, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1936, carry on any form of banking business other than those specified in S. 277 F.⁵

Restriction on the Employment of Managing Agent :

No banking company can, after the expiry of two years from 1st July, 1944 employ or be managed by a managing agent, or any person whose remuneration or part of whose remuneration takes the form of commission or a share in the profits of the Company, or any person having a contract with the Company

¹ S. 4(4), *Ibid.*

² S. 4(5), *Ibid.*

³ S. 4(3) *Ibid.*

⁴ S. 277 G (1)

⁵ S. 277 G (2)

for its management for a period exceeding five years from 1st July, 1944.¹

Capital Requirements and Restriction on Commencement of Business.

No banking company incorporated on or after the 1st day of January, 1937 can commence business, unless shares have been allotted to an amount sufficient to yield a sum of at least Rs. 50,000/- as working capital and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid-up capital has been filed with the Registrar. No banking company whether incorporated in or outside British India, if incorporated on or after 15th January, 1937 shall after the expiry of two years from 1st July, 1944, carry on business in British India unless it satisfies the following conditions, namely

- (e) that the subscribed capital of the Company is not less than half the authorised capital and the paid-up capital is not less than half the subscribed capital, and
- (b) that the capital of the company consists of ordinary shares only or ordinary shares and such preference shares as may have been issued before the 1st of July 1944
- (c) that the voting rights of all shareholders are strictly proportionate to the contribution made by the share holders to the paid up capital of the Company ?-

Prohibition of Charge on unpaid Capital :

No banking company can create any charge upon any unpaid capital of the company and any such charge shall be invalid.² This provision does not seem to affect any such charge created before the commencement of the companies Amendment Act, 1936, for this provision was not existent before. The general rule of construction is that the repeal or amendment of an Act does not affect a right already in existence unless a contrary intention is made out expressly or by implication.⁴ "The appli

¹ S 277 HH (This section has been inserted by the Companies Amendment Act IV of 1944 which came into force on 1st July, 1944)

² S 277 I as amended by the Amendment Act of 1944.

³ S 277 J

⁴ Chowdhury Gursaran vs Akhouri, I L R 6 Pat. 296.

cation of an Act is when the parties begin to move under it."¹ This provision is designed to protect the interests of the creditors of the company by keeping the unpaid capital available for them in case the company becomes insolvent.

Revenue Fund :

Every banking company must, after the commencement of the Indian Companies (Amendment) Act, 1936, and in the case of a banking company incorporated before that Act, after the expiry of two years from such commencement, maintain a reserve fund² and transfer, out of the declared profits of each year and before any dividend is declared, a sum equivalent to not less than twenty per cent of such profits to the reserve fund until the amount of the said fund is equal to the paid up capital.³ A banking company must invest the amount standing to the credit of its reserve fund in Government Securities or in securities mentioned or referred to in S. 20 of the Indian Trusts Act, 1882 or keep deposited in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (c) of S. (2) of the Reserve Bank of India Act, 1934.⁴

Cash Reserve :

Every Banking company excepting a scheduled bank must maintain by way of cash reserve in cash a sum equivalent to at least one and a half per cent of the time liabilities and five per cent of the demand liabilities of such company and file with the Registrar before the tenth day of every month (three copies) a statement of the amount so held on the Friday of each week of the preceding month with the particulars of the time and demand liabilities of each such day.⁵ "Demand liabilities" mean liabilities which must be met on demand, such as the amount standing in the current account of a customer which may be drawn against at any time, and "time liabilities" mean liabilities which need not be met on demand, e.g. fixed deposit of customers.

¹ Keshoram *vs.* Nandolal, 54 I.A. 152.

² S. 277 K(1).

³ S. 277 K(2).

⁴ S. 277 K(3).

⁵ S. 277 L(1).

⁶ S. 277 L(2).

Penalties :

If default is made in complying with the above provisions relating to limitation of activities of banking company, or the employment of managing agent, or the prohibition of charge on unpaid capital or requirements of Reserve Fund, every director or other officer of the company who is knowingly and wilfully a party to the default is liable to a fine not exceeding Rs. 500/- for every day during which the default continues. If default be made in filing the statement relating to cash reserve, every such director or officer will be liable to a fine not exceeding Rs. 100/- for every day during which the default continues.¹

Restriction on Nature of Subsidiary Companies and the Holding of Shares:

A banking company except one incorporated before the commencement of the companies Amendment Act, 1936, cannot form a subsidiary company except one formed for the purpose of undertaking and executing trusts or undertaking the administration of estates as executor, trustee or otherwise and for such other purposes set forth in S. 277F as are incidental to the business of accepting deposits of money on current account or otherwise.² A banking company, formed after the commencement of the Amendment Act of 1936, cannot also hold shares in any other company, excepting in such subsidiary company as is allowed to be formed by the company, of an amount exceeding forty per cent of the issued share as a pledgee, mortgagee or absolute owner thereof.³ Noncompliance with this provision is visited with the same penalty as mentioned above.

Power of Court to Stay Proceedings or Grant a Moratorium:

The court may, on the application of a banking company which is temporarily unable to meet its obligations, make an order staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time on such terms and conditions as it may think fit and proper and may from time to time extend the period.⁴ The application of

¹ S. 277 L(4).

² S. 277 M(1).

³ S. 277 M(2).

⁴ S. 277 N(1).

the company must be accompanied by a report of the Registrar provided that in the case of extreme urgency the court may grant interim relief pending the hearing of the application without the Registrar's report.¹ But the Registrar's report must be forthcoming before the final order is made. The Registrar is entitled at the cost of the company to investigate the financial condition of the company and for such purpose to have the books and documents of the company examined by an accountant holding a certificate issued by the Governor General in Council entitling him to be an auditor of companies.² This provision is intended to allow an otherwise solvent company a breathing time so as to enable it to overcome a temporary shock e.g. war or civil commotion and realise its assets and readjust its affairs. But this provision cannot be used to keep an insolvent company continuing its operations under the protection of the court and to prevent those who had dealings with the company from seeking legal remedies to which they would otherwise have been entitled.³

Balance Sheet :

The balance sheet and profit and loss account or income and expenditure account of every banking company must be signed by the manager or managing agent (if any) and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors.⁴ As regards laying the balance sheet and profit and loss account or income and expenditure account before the shareholders and filing the same with the Registrar, a banking company is subject to the same rules as an ordinary company.⁵

Submission of Statements :

Every banking company must, before it commences business and also on the first Monday in February and the first Monday in August in every year during which it carries on business must make a statement in the following form which is included in

¹ S. 277 N(2).

² S. 277 N(3).

³ Benares Bank Ltd. (1930) All. 726.

⁴ S. 133 (1).

⁵ S. 136 (1).

the third schedule of the Indian Companies Act, 1913 as Form No. G, or as near thereto as possible.¹

Form G. (Schedule III)

The share capital of the company is Rs
divided into shares of Rs each

The number of shares issued is Calls to the
amount of Rs. per share have been made, under
which the sum of Rs has been received

The liabilities of the company on the thirty-first day of
December (or thirtieth of June) were –

Debts owing to Sundry persons by the company

Under decree, Rs

On mortgages or bonds, Rs

On notes, bills or hundis Rs

On other contracts, Rs

On estimated liabilities, Rs

The assets of the company on that day were –

Government securities (stating them), Rs

Bills of Exchange, hundies and promissory notes Rs

Cash at the bankers, Rs

Other securities Rs

Publication of the Statement and the Balance Sheet :

A copy of the statement together with a copy of the last audited balance sheet laid before the members of the company must be kept displayed until the display of the next following statement in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on¹ Every member and every auditor of the company is entitled to a copy of the statement on payment of a sum not exceeding eight annas² If a company makes default in complying with the requirements of this section, it will be liable to a fine not exceeding Rs 50/- for every day during

¹ S. 136 (2)

² S. 136 (3)

which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default will be liable to the same penalty.¹

Investigation of Affairs :

The Central Government may appoint one or more competent inspectors to investigate the affairs of a banking company, having a share capital, on the application of members holding not less than one fifth of the shares issued.² The application must be supported by such evidence as the Central Government may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation; and the Central Government may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.³ All persons who are or have been officers of the company must produce to the inspectors all books and documents in their custody or favour relating to the company and must answer on oath all questions asked by the inspectors relating to the business of the company, failing which they will be liable to a fine not exceeding Rs. 50/- for each offence.⁴ The report of the inspector must be forwarded to the Central Government and will serve as evidence in any legal proceeding.⁵

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¹ S. 136 (4).

² S. 138 (1).

³ S. 139.

⁴ S. 140(1), (2) & (3)

⁵ S. 141(1) & S. 143.

Hand Book of Commercial Law

PART II

The Indian Contract Act, 1872

[As modified up to the 15th November, 1943.]

Whereas it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows :—

Preamble.

Preliminary.

Short title.

1. This Act may be called the Indian Contract Act, 1872.

Extent, Commencement.
of September, 1872.

It extends to the whole of British India; and it shall come into force on the first day

* * * nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

Enactments repealed.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

Interpretation clause.

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other person, such act or abstinence, he is said to make a proposal.

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee".

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise :

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement :

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises

(g) An agreement not enforceable by law is said to be void

(h) An agreement enforceable by law is a contract

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable

CHAPTER I

Of The Communication, Acceptance And Revocation of Proposals.

3 The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances respectively, are deemed to be made by act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance of a proposal, is complete as against the proposer, when it comes to the knowledge of the proposer, and as against the acceptor, when it comes to the knowledge of the acceptor, so as to be out of the power of the proposer, when it comes to the knowledge of the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation of any promise made by a person, is complete as against the person who makes it, when it comes to the knowledge of the person to whom it is made, and as against the person to whom it is made, when it comes to the knowledge of the person who makes it.

Illustrations.

(a) A proposes, by letter, to sell a house to B. The communication of the proposal is complete as against A, when the letter is posted; and as against B, when the letter is received by him.

The communication of the acceptance is complete as against A, when the letter is posted; and as against B, when the letter is received by him.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete as against A, when the letter is posted; and as against B, when the letter is received by him.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

5. A proposal may be revoked at any time before its acceptance. Revocation of a proposal is complete as against the proposer, when it comes to the knowledge of the proposer, and as against the acceptor, when it comes to the knowledge of the acceptor.

An acceptance may be revoked at any time before its communication. Revocation of an acceptance is complete as against the proposer, when it comes to the knowledge of the proposer, and as against the acceptor, when it comes to the knowledge of the acceptor.

~~When, at the death of the proposer~~

any other person by post, to sell his house to B. or does or abstains from making a letter sent by post. to abstain from making a proposal at any time before or at the time of the promise: as letter of acceptance, but not after

(e) Every promise is made at any time before or at the time of the promise: as letter of acceptance, but not after communicating it reaches A, but not

(f) Promise

conf

prom

6. A proposal is revoked—

(g) An offer of the communication of notice of revocation by the

(h) An offer to the other party;

(i) An offer of the time prescribed in such proposal operates acceptance or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(j) A failure of the acceptor to fulfil a condition precedent to acceptance; or

the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute

7. In order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes in a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

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Performance of the conditions of a proposal, or acceptance by performing conditions, or receiving consideration. Acceptance of any consideration for a proposal, is an acceptance of the proposal.

9. In so far as the proposal or acceptance of any promise made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

CHAPTER II

Of Contracts, Voidable Contracts and Void Agreements

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

—A person who is, usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

"Free consent" defined.

14. Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence,* as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. "Coercion" is the committing or threatening to commit any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

*Explanation :—It is immaterial whether the Indian Penal

Code is or is not in force in the place where the contract is employed.

Illustrations.

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the fact was done.

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

Illustrations.

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an usually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with "Fraud" defined. his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

- (1) the suggestion as a fact, of that which is not true by one who does not believe it to be true ;
- (2) the active concealment of a fact by one having knowledge or belief of the fact ;
- (3) a promise made without any intention of performing it ;
- (4) any other act fitted to deceive;

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- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations.

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A—"If you do not deny it I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

Misrepresentation defined 18. "Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, misleading another to his prejudice or to the prejudice of any one claiming under him;
- (3) causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

19. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B. B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

[19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Power to set aside contract induced by undue influence

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

(a) A's son has forged B's name to a promissory note. B under threat of prosecuting A's son obtains bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

Agreement void where both parties are under mistake as to a matter of fact

21. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations.

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

Effects of mistakes
as to law.

[After the establishment of the Federation of India this section applies in relation to Central Acts made for a Federated State as it applies to laws in force in British India.]

Illustration.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

Contract caused
by mistake of one
party as to a matter
of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

What considera-
tions and objects
are lawful and
what not.

23. The consideration or object of an agreement is lawful, unless—
it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or
is fraudulent; or

involves or implies injury to the person or property of another,
or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations.

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and

B is void, as it implies a fraud by concealment by A, on his principal.

(k) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(l) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(m) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(n) A agrees to let her daughter to live with B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

Void Agreements.

24. If any part of a single consideration for one or more Agreements void if considerations and objects unlawful in part objects, or any one or any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration.

A promises to superintend, on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees. The agreement is void, the object of A's promise and consideration for B's promise being in part unlawful.

25. An agreement made without consideration is void, unless—

Agreement with out consideration void unless it is in writing and registered.

(1) it is expressed in writing and registered under the law for the time being in force for the registration of [document], and is made on account of natural love and

affection between parties standing in a near relation to each other, or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

(3) it is a promise, made in writing and signed by the person or is a promise to pay a debt, barred by limitation law. to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

Agreement in restraint or marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein: Provided that such limits appear to the Court reasonable regard being had to the nature of the business.

* * * *

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in

Savings of contract to refer to arbitration dispute that may arise.

such arbitration shall be recoverable in respect of the dispute so referred.

When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of

Suits barred by the amount so awarded, is brought by one such contracts. party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration

Saving of contract to refer questions that have already arisen.

Agreement void for uncertainty

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations.

(a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in cocoanut-oil only, agrees to sell to B "one hundred tons oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) A agrees to sell to B "all the grain in my granary at Ramnagar." There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

30. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Agreement by way of wager void

This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Exception in favour of certain prizes for horse racing.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294 of the Indian Penal Code not affected, XLV of 1860 apply.

Section 294 A of the Indian Penal Code not affected, XLV of 1860

CHAPTER III

Of Contingent Contracts.

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

"Contingent contract" defined.

Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

Enforcement of contracts contingent on an event happening.

If the event becomes impossible such contracts become void.

Illustrations.

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Enforcement of contracts contingent on an event not happening

Illustration.

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

Illustration.

A agrees to pay B a sum of money if B marries C
C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if before the time fixed, such event becomes impossible.

When contracts become void which are contingent on happening of specified event within fixed time.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Illustrations.

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Agreement contingent on impossible events void.

Illustration.

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of agreement. The agreement is void.

CHAPTER IV

Of the Performance of Contracts.

Contracts which must be performed.

37 The parties to a contract must either perform, or offer to perform their respective promises unless
Obligation of parties to contracts such performance is dispensed with or excused under the provisions of this Act, or of any other law

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract

Illustrations

(a) A promises to deliver goods to B on a certain day on payment of Rs 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs 1,000 to A's representatives

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B

38 Where a promisor has made an offer of performance to the promisee, and the offer has not been
Effect of refusal to accept offer of performance accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract

Every such offer must fulfil the following conditions —

(1) it must be unconditional

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do :

- (3) if the offer is an offer to deliver anything to the promisee the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration.

A contracts to deliver to B at his warehouse, on the first March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

Effect of refusal of party to perform promise wholly.

Illustrations.

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months. And B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence of the contract, and

cannot now put an end to it but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

By whom Contracts must be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Person by whom
promise is to be
performed.

Illustrations.

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

Effect of accept-
ing performance
from third person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representatives jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Devolution of
joint liabilities.

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [one or more] of such joint promisors to perform the whole of the promise.

Any one of joint
promisors may be
compelled to per-
form.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover any thing from the surety on account of payments made by the principal.

Illustrations

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly

Illustration

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

Time and place for performance

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Time for performance of promise where no application is to be made and no time is specified

Explanation—The question 'what is a reasonable time' is, in each particular case, a question of fact.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Time and place for performance of promise where time is specified and no application to be made

Illustration

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Application for performance on certain day to be at proper time and place.

Explanation.—The question “what is a proper time and place” is, in each particular case, a question of fact.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Place for performance of promise where no application to be made and no place fixed for performance.

Illustration.

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Performance in manner or at times prescribed or sanctioned by promisee.

Illustrations.

(a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B respectively, of the sums which they owed to each other.

(c) A owes B 2,000 rupees. B accepts some of A's goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the notes duly addressed to A.

Performance of Reciprocal Promises.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations.

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment unless A is ready and willing to deliver the goods on payment of the first instalment.

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Order of performance of reciprocal promises

Illustrations.

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security given, for the nature of transaction requires thus A should have security before he delivers up his stock.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Liability of party preventing event on which contract is to take effect.

Illustration.

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of A; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Effect of default as to the promise which should be first performed in contract consisting of reciprocal promises.

Illustrations.

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of such failure when time is not essential.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Effect of acceptance of performance at time other than that agreed upon.

Agreement to do impossible act.

56. An agreement to do an act impossible in itself is void.

A contracts to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Contract to do act afterwards becoming impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Compensation for loss through non-performance of act known to be impossible or unlawful

Illustrations.

(a) A agrees with B to discover treasure by magic. The agreement is void.

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

57. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Reciprocal promises to do things legal and also other things illegal.

Illustration.

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal one branch being branch alone can be enforced.

Alternative promise, one branch being illegal.

Illustration.

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice and void agreement as to the opium.

Appropriation of Payments.

59. Where a debtor owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated.

Illustrations.

(a) A owes to B, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Application of payment where debt to be discharged is not indicated.

61. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Application of payment where neither party appropriates

Contracts which need not be performed.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Effect of novation, rescission and alteration of contract.

Illustrations.

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Promisee may dispense with or remit performance of promise.

Illustrations.

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes to B 5,000 rupees. C pays to B 1,000 rupees,

and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A without ascertaining the amount gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt whatever may be its amount. *

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B to pay them a [composition] of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor.

Consequences of rescission of voidable contract. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Obligation of person who has received advantage under void agreement or contract that becomes void.

Illustrations.

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre.

to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

Mode of communicating or revoking rescission of voidable contract.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places, in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER V

Of certain Relations resembling those created by Contract.

68. If a person, incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Claim for necessities supplied to person incapable of contracting, or on his account.

Illustrations.

(a) A supplies B, a lunatic, with necessities suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessities suitable to their condition in life. A is entitled to be reimbursed from B's property.

Reimbursement of person paying money due by another in payment of which he is interested

69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration.

B holds land in Bengal, on a lease granted by A, the zemindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Obligation of person enjoying benefit of non-gratuitous act

Illustrations.

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

Responsibility of finder of goods. 71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion. 72. A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

Illustrations.

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

CHAPTER VI.

Of the Consequences of Breach of Contract.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Compensation for failure to discharge obligation resembling those created by contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there takes on board, on the first of January, a cargo which A is to provide and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freight rises, and on the first of January the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at fixed price, being a higher price than that for which B could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the

delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of re-building the house for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mills.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January and B pays to A, by way of deposit one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

74. [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach,

or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the [Central Government] or of any [Provincial Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person, who enters into a contract with the Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations.

(a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 1,000 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

Party rightfully rescinding contract entitled to compensation

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration.

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

CHAPTER VII.

Of Indemnity and Guarantee.

124. A contract by which one party promises to save the other from loss caused to him by the
 "Contract of Indemnity" defined. conduct of the promisor himself, or by the conduct of any other person, is called a
 "contract of indemnity".

Illustration.

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to
 Rights of Indemnity-holder when sued recover from the promisor—

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnity applies ;

- (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to be surety for giving the guarantee.

Consideration for guarantee.

Illustrations.

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year and promises that

if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Surety's liability.

Illustration.

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

129. A guarantee which extends to a series of transaction is called a "continuing guarantee."

Continuing guarantee.

Illustrations.

(a) A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the sacks.

Revocation of continuing guarantee.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations.

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.

Illustration.

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time

when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

133. Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Discharge of surety
by variance in terms
of contract.

Illustrations.

(a) A becomes surety to C for B's conduct as a manager in C's band. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw and the bank loses a sum of money. A is discharged from the suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of A is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then exist-

ing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied in as much as C might sue B for the money before the 1st of March.

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Discharge of surety by release or discharge of principal debtor.

Illustrations.

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with C to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Surety not discharged when agreement made with third persons to give time to principal debtor.

Illustrations.

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Creditor's forbearance to sue does not discharge surety.

Illustration.

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Release of one co-surety does not discharge others

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

Illustrations.

(a) B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract.

C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B, for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform, a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations.

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

Guarantee obtained by misrepresentation invalid.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by concealment invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations.

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Guarantee on contract that creditor shall not act on it until co-surety joins.

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully

Implied promise to
indemnify surety

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Co-sureties liable to
contribute equally

Illustrations.

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations.

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are each liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

CHAPTER IX

Of Bailment

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor" The person to whom they are delivered is called the "bailee".

Explanation—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment

149 The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

150 The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed

Illustrations

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse

runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Care to be taken by
bailee.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Bailee when not
liable for loss, etc. of
thing bailed.

Termination of bail-
ment by bailee's act
inconsistent with
conditions.

153 A contract of bailment is void-
able at the option of the bailor, if the bailee
does any act with regard to the goods
bailed, inconsistent with the conditions of
the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Liability of bailee
making unauthorized
use of goods bailed.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care but the horse, accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and bailee shall have an interest in proportion to their respective shares, in the mixture thus produced.

Effect of mixture with bailor's consent of his goods with bailee's.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Effect of mixture without bailor's consent when the goods can be separated

Illustration

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with others bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture without bailor's consent, when the goods cannot be separated.

Illustration

A bails a barrel of Cape flour worth Rs. 45 to B, B, without A's consent, mixes the flour with country flour of his own, worth only Rs 25 a barrel, B must compensate A for the loss of his flour.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Repayment by bailor
of necessary expenses.

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Restoration of goods
lent gratuitously.

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Return of goods
bailed on expiration
of time or accom-
plishment of purpose

161. If by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Bailee's responsi-
bility when goods are
not duly returned

Termination of gra-
tuitous bailment by
death

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to
increase or profit
from goods bailed

Illustration

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them.

Bailor's responsibility to bailee

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by several joint owners.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to directions of the bailor, the bailee is not responsible to the owner in respect of such delivery.

Bailee not responsible on re-delivery to bailor without title

167. If a person, other than bailor, claims goods bailed, he may apply to the court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Right of third person claiming goods bailed

168. The finder of goods has no right to use the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a special reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Right of finder of goods; may sue for specific reward offered.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

When finder of thing commonly on sale may sell it.

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder in respect of the thing found, amount to two-thirds of its value.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Bailee's particular lien.

Illustrations

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three month's credit for the price. B is not entitled to retain the coat until he is paid.

171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

Bailments of Pledges

172. The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor is in this case called the 'pawnor'. The bailee is called the 'pawnee'.

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the

amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition any expenses which have arisen from his default

Defaulting pawnor's right to redeem

178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge

Pledge by mercantile agent

Explanation.—In this section, the expressions 'mercantile agent', and 'documents of title' shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

178A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided, he acts in good faith and without notice of the pawnor's defect of title.

Pledge by person in possession under voidable contract

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Pledge where pawnor has only a limited interest.

Suits by Bailees or Bailors against Wrong-doers.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Appointment of relief or compensation obtained by such suits

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER X

Agency*Appointment and Authority of Agents.*

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the "principal".

'Agent' and 'Principal' defined.

Who may employ agent.

employ an agent.

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Who may be an agent.

Consideration not
necessary
Agent's authority
may be expressed or
implied

185. No consideration is necessary to create an agency.

186. The authority of an agent may be expressed or implied.

187. An authority is said to be expressed when it is given by words spoken or written. An authority is said to be implied when

Definitions of ex-
press implied
authority
it is to be inferred from the circumstances of the case ; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purpose of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business

Illustrations

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agent's authority in an emergency.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Sub-Agents.

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must be employed.

When agent cannot delegate.

191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

"Sub-agent" defined

192. Where a sub-agent is properly appointed the principal is, so far as regards third person, represented by the sub-agent, and is bound by and responsible for his acts as if he were an agent originally appointed by the principal.

Representation of principal by sub agent properly appointed

The agent is responsible to the principal for the acts of the sub-agent :

Agent's responsibility for sub-agents

The sub-agent is responsible for his acts to the agents, but not to the principal, except in case of fraud or wilful wrong.

Sub agent's responsibility

193. Where an agent, without having authority to do so, has

appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for acts of the person so employed, nor is that person responsible to the principal.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him.

Relation between principal and person duly appointed by Agent to act in business of agency.

Illustrations.

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co., B instructs D, a solicitor, to take legal proceedings against C & Co., for the recovery of the money. D is not a sub-agent but is solicitor for A.

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty in naming such person

Illustrations.

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns

out to be unseaworthy and is lost. B is not, but the surveyor is responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Ratification.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

Right of person as to acts done for him without his authority.
Effect of ratification

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Ratification may be expressed or implied.

Illustrations.

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Knowledge requisite for valid ratification.

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Effect of ratifying unauthorized act forming part of a transaction.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Ratification of unauthorized act cannot injure third person.

Illustrations.

(a) A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Revocation of Authority.

201. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Termination of agency.

Termination of agency where agent has an interest in subject-matter.

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations.

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price, the amount of his own

advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

203. The principal may, save as is otherwise proved by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may revoke agent's authority.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation where authority has been partly exercised.

Illustrations.

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation by principal or renunciation by agent.

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Notice of revocation or renunciation

Revocation and renunciation may be expressed or implied.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustrations.

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

Illustrations.

(a) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty on termination of agency by principal's death or insanity.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Termination of sub agents' authority.

Agent's Duty to Principal.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such direction, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Agent's duty in conducting principal's business.

Illustrations.

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investment.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Skill and diligence required from agent

Illustrations.

(a) A, a merchant in Calcutta, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money, for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as e.g., by variation of rate of exchange—but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit without making proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England directs B, his agent at Bombay who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand.

214. It is the duty of an agent, in cases of difficulty, to use

Agent's duty to communicate with principal.

all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal

Right of principal when agent deals, on his own account, in business of agency without principal's consent and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings, of the agent have been disadvantageous to him

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate may either repudiate or adopt the sale at his option.

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of in account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

217. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's right of retaining out of sums received on principal's account.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Agent's duty to pay sums received for principal.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

When agent's remuneration becomes due.

220. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent not entitled to remuneration for business misconducted.

Illustrations.

(a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees and he must make good the 2,000 rupees to B.

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

221. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether moveable, or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him

Principal's Duty to Agent

Agent to be indemnified against consequences of lawful acts

222 The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him

Illustrations

(a) B, at Singapore, under instructions from A of Calcutta contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and expenses.

223 Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Agent to be indemnified against consequences of act done in good faith

Illustrations.

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Non-liability of employer of agent to do a criminal act.

Illustrations.

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes at A's request a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Compensation to agent for injury caused, by principal's neglect.

Illustration.

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

Effect of agency on contract with third persons.

226. Contracts entered into through an agent and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Enforcement and
consequence of
Agent's contracts

Illustrations.

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b) A, being B's agent with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

227. Where an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

Principal how far
bound when agent
exceeds authority.

Illustration.

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration.

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Illustrations.

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contracts to contrary.

Such a contract shall be presumed to exist in the following cases :—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :
- (2) where the agent does not disclose the name of his principal :
- (3) where the principal, though disclosed, cannot be sued.

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

Rights of parties to a contract made by agent not disclosed.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Performance of contract with agent supposed to be principal

Illustration.

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

233. In cases where the agent is personally liable, a person
 Right of person dealing with agent personally liable dealing with him may hold either him or his principal, or both of them liable.

Illustration.

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequence of inducing agent or principal to act on behalf that principal or agent will be held exclusively liable

235. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Liability of pretended agent.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

Person falsely contracting as agent not entitled to performance.

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Liability of principal inducing belief that agent's unauthorized acts were authorized.

*
Illustrations.

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed by the principals; but misrepresentations made, or frauds committed by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations.

(a) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C at the option of C

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

Indian Sale of Goods Act

An Act to define and amend the law relating to the sale of goods

Whereas it is expedient to define and amend the law relating to the sale of goods ; it is hereby enacted as follows :—

CHAPTER 1

Preliminary

1. (1) This Act may be called the Indian Sale of Goods Act, 1930.

| | |
|---|---|
| Short title, extent and commencement | (2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas. |
|---|---|

(3) It shall come into force on the first day of July, 1930.

2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

- (1) “ buyer ” means a person who buys or agrees to buy goods ;
- (2) “ delivery ” means voluntary transfer of possession from one person to another ;
- (3) goods are said to be in a “ deliverable state ” when they are in such state that the buyer would, under the contract, be bound to take delivery of them ;
- (4) “ document of title to goods ” includes a bill of lading, dock-warrant, warehouse keeper’s certificate, wharfingers’ certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising

fitness for a particular purpose may be annexed by the usage of trade.

- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

17. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

Sale by sample.

(2) In the case of a contract for sale by sample there is an implied condition—

- (a) that the bulk shall correspond with the sample in quality ;
- (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;
- (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

CHAPTER III

Effects of the Contract

Transfer of property as between seller and buyer.

18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Goods must be ascertained.

19. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyers at such time as the parties to the contract intend it to be transferred.

Property passes when intended to pass.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

20. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

Specific goods in a deliverable State

21. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Specific goods to be put into a deliverable state.

22. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price

23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

Sale of unascertained goods and appropriation.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does

Delivery to carrier

not reserve the right of disposal, he is deemed to have unconditionally appropriated in goods to the contract.

Goods sent on approval or "on sale or return".

24. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

25. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

26. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

Risk *prima facie* passes with property.

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Transfer of title

27. Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell :

Sale by person not the owner.

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

28. If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint

Sale by one of joint owners.

owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

29. When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Sale by person in possession under voidable contract IX of 1872

30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

CHAPTER IV

Performance of the Contract

31. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Duties of seller and buyer.

32. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Payment and delivery are concurrent conditions.

33. Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

Delivery.

34. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole: but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Effect of part delivery.

35. Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

Buyer to apply for delivery.

36. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they

Rules as to delivery.

*are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf :

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

37. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

Delivery of wrong quantity.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

38. (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Instalment delivery

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

39. (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

Delivery to carrier or wharfinger.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

40. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Risk where goods are delivered at distant place.

41. (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Buyer's right of examining the goods.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

42. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Acceptance

43. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Buyer not bound to return rejected goods

44. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods :

Liability of buyer for neglecting or refusing delivery of goods.

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

CHAPTER V

Rights of Unpaid Seller against the Goods

45. (1) The seller of goods is deemed "Unpaid seller" defined. to be an "unpaid seller" within the meaning of this Act—

- (a) when the whole of the price has not been paid or tendered ;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

46. (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding Unpaid seller's rights. that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a) a lien on the goods for the price while he is in possession of them ;
- (b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them ;
- (c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer the unpaid seller has, in addition to his other remedies, a right of

withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

Unpaid seller's lien

47. (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

- (a) where the goods have been sold without any stipulation as to credit ;
- (b) where the goods have been sold on credit, but the term of credit has expired .
- (c) where the buyer becomes insolvent

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer

48 Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien

49 (1) The unpaid seller of goods loses his lien thereon—

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods ,
- (b) when the buyer or his agent lawfully obtains possession of the goods .
- (c) by waiver thereof.

(2) The unpaid seller of goods, having lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

Stoppage in transit.

50. Subject to the provisions of the Act, when the buyer of

goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

51. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in

such circumstances as to show an agreement to give up possession of the whole of the goods.

52. (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the direction of, the seller. The expenses of such re-delivery shall be borne by the seller.

Transfer by buyer and seller.

53. (1) Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto :

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledge to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other

goods or securities of the buyer in the hands of the pledgee and available against the buyer.

54. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

Sale not generally
rescinded by lien or
stoppage in transit.

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not, within a reasonable time, pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

CHAPTER VI

Suits for Breach of the Contract

55. (1) Where under a contract of the sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods

Suit for price

according to terms of the contract, the

seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

Damages for non-acceptance.

56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

Damages for non-delivery.

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may sue the seller for damages for non-delivery.

58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

Remedy for breach of warranty.

59. (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of condition on the part of the seller as breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

- (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
- (b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from

suing for the same breach of warranty if he has suffered further damage.

60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

61. (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price—

- (a) to seller in a suit by him for the amount of the price—
from the date of the tender of the goods or from the date on which the price was payable ;
- (b) to the buyer in a suit by him for the refund of the price in a case of breach of the contract on the part of the seller--from the date on which the payment was made.

CHAPTER VII

Miscellaneous

62 Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Reasonable time
a question of
fact.

63. Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

Auction sale.

64. In the case of a sale by auction—

- (1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale ;
- (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner ; and, until such announcement is made, any bidder may retract his bid ;
- (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction ;
- (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person ; and any sale contravening this rule may be treated as fraudulent by the buyer ;
- (5) the sale may be notified to be subject to a reserved or upset price ;
- (6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

Repeal.

65. Chapter VII of the Indian Contract Act, 1872, is hereby repealed.

Savings.

affect—

66. (1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or
- (c) anything done or suffered before the commencement of

(d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or

(e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

The Indian Partnership Act, 1932

(IX of 1932)

[Passed by the Indian Legislature]

*(Received the assent of the Governor-General on the
8th April, 1932.)*

An Act to define and amend the law relating to partnership.

Whereas it is expedient to define and amend the law relating to partnership ; It is hereby enacted as follows :—

CHAPTER I.

Preliminary

**Short title, extent
and commence-
ment.**

1. (i) This Act may be called the Indian Partnership Act, 1932.

(ii) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(iii) It shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October, 1933.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) an “act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;

(b) “business” includes every trade, occupation and profession ;

(c) “prescribed” means prescribed by rules made under this Act ;

(d) “third party” used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and

(c) expressions used but not defined in this Act, and defined in the Indian Contract Act, 1872, shall have the meanings assigned to them in that Act.

IX of 1872.

Application of provisions of Act IX of 1872.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

CHAPTER II.

The Nature of Partnership

Definition of "partnership", "partner", "firm" and "firm name"

4 "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name."

5. The relation of partnership arises from contract and not from status ;
Partnership not created by status. and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such, are not partners in such business.

6. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does

not of itself make him a partner with the persons carrying on the business ;

and, in particular, the receipt of such share or payment—

(a) by a lender of money to persons engaged or about to engage in any business,

(b) by a servant or agent as remuneration,

(c) by the widow or child of a deceased partner, as annuity, or

(d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

7. Where no provision is made by contract between the Partnership partners for the duration of their partnership, or at will. for the determination of their partnership, the partnership, is "partnership at will."

Particular partnership 8. A person may become a partner with another person in particular adventures or undertakings

CHAPTER III

Relation of Partners to one another

9. Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

General duties of partners. 10. Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

Duty to indemnify for loss caused by fraud. 11. (i) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

Such contract may be varied by consent of all the partners.

and such consent may be express or may be implied by a course of dealing.

(ii) Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

The conduct of the business. 12. Subject to contract between the partners—

(a) every partner has a right to take part in the conduct of the business ;

(b) every partner is bound to attend diligently to his duties in the conduct of the business ;

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided but no change may be made in the nature of the business without the consent of all the partners ; and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

Mutual rights and liabilities. 13. Subject to contract between the partners

(a) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;

(b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;

(c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;

(d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent. per annum ;

(e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business and

(ii) in doing such act, in an emergency, for the purpose

of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances ; and

- (f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

14. Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

15. Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

16. Subject to contract between the partners, -

- (a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;

- (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

17. Subject to contract between the partners,—

(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;

(b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry,

so far as they may be consistent with the incidents of partnership at will ; and

(c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

CHAPTER IV

Relations of Partners to Third parties

18. Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

19. (i) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority."

(ii) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to -

(a) submit dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immoveable property on behalf of the firm,

(g) transfer immoveable property belonging to the firm, or

(h) enter into partnership on behalf of the firm.

Extension and
restriction of
partner's implied
authority

20 The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

21. A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

22 In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

23 An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business

24. Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner

25 Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner

26 Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

27. Where—

(a) a partner acting with his apparent authority receives money or property from a third party and misapplies it, or

(b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

28. (i) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be partner does or does not know that the representation has reached the person so giving credit.

(ii) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

29. (1) A transfer by partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

30. (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm. or

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48:

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such a suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm :

Provided that if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

(7) Where such person becomes a partner,—

(a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

(a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4.)

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

CHAPTER V

Incoming and outgoing partners

31. (1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm, without the consent of all the existing partners.

Introduction
of a partner.

(2) Subject to the provisions of section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

32. (1) A partner may retire—

Retirement of a
partner.

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners,
or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement.

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

33. (1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

Expulsion of a partner.

(2) The provision of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

34. (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

Insolvency of a partner

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

35. Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

Liability of estate of deceased partner.

36. (1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to contrary he may not :—

Rights of outgoing partner to carry on competing business.

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

(2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits ; and, notwithstanding anything contained in section 27 the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Agreements in restraint of trade.

37. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm ;

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

38. A continuing guarantee given to a firm, or to a third party in respect of transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

CHAPTER VI

Dissolution of a Firm

39. The dissolution of a partnership between all the partners of a firm is called the "dissolution of the firm".

40. A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

41. A firm is dissolved :—
 (a) by the adjudication of all the partners or of all the partners but one as insolvent, or

Compulsory
dissolution.

- (b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership :

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

42. Subject to contract between the partners a firm is dissolved on the happening of certain contingencies :—

- (a) if constituted for a fixed term, by the expiry of that term ;
 (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof ;
 (c) by the death of a partner ; and
 (d) by the adjudication of a partner as an insolvent.

43. (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned as from the date of the communication of the notice.

44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely :—

- (a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;
 (b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;
 (c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;
 (d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts

himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;

- (e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner ;
- (f) that the business of the firm cannot be carried on save at a loss ; or
- (g) on any other ground which renders it just and equitable that the firm should be dissolved.

45. (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution :

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub-section (1) may be given by any partner.

46. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

47. After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and

to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

48. In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :—

Mode of settle-
ment of accounts
between partners.

- (a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.
- (b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :—
 - (i) in paying the debts of the firm to third parties ;
 - (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;
 - (iii) in paying to each partner rateably what is due to him on account of capital ; and
 - (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

49. Where there are joint debts from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

50. Subject to contract between the partners, the provisions

Personal profits earned after dissolution. of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

51. Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless—

- (a) the dissolution is mainly due to his own misconduct, or
- (b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

52. Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled —

- (a) to a lien on, or a right of retention of, the surplus on the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him :
- (b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm; and
- (c) to be indemnified by the partner or partner guilty of the fraud or misrepresentation against all the debts of the firm.

53. After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :

Right to restrain from use of firm name or firm property.

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

54. Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

55. (1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along other property of the firm.

(2) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

- Rights of buyer and seller of goodwill.
- (a) use the firm name.
 - (b) represent himself as carrying on the business of the firm, or
 - (c) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Agreements in restraint of trade.

CHAPTER VII

Registration of Firms

56. The Governor-General in Council may, by notification in the Gazette of India, direct that the provisions of this Chapter shall not apply to any province or to any part thereof in the notification.

Power to exempt from application of this Chapter.

57. (1) The Local Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

Appointment of Registrars.

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

58. (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—

Application of registration.

- (a) the firm name,
- (b) the place or principal place of business of the firm.
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm.
- (e) the names in full and permanent addresses of the partners, and
- (f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words, namely :—

“Crown,” “Emperor,” “Empress,” “Empire,” “Imperial,” “King,” “Queen,” “Royal,” or words expressing or implying the sanction, approval or patronage of the Crown or the Government of India or a Local Govern-

ment, except when the Governor-General in Council signifies his consent to the use of such words as part of the firm name by order in writing under the hand of one of the Secretaries of the Government of India.

59. When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall
Registration. record an entry of the statement in a register called the Register of Firms, and shall file the statement.

60. (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.
Recording of alterations in firm name and principal place of business.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

61. When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.
Nothing of closing and opening of branches

62. When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.
Nothing of changes in names and address of partners.

63. (1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specify-
Recording of changes in and dissolution of a firm.

ing the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

64. (1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm in conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

65. A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

66. (1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

67. The Registrar shall on application furnish to any person, any payment of such fee as may be prescribed, a copy certified under his hand, of any entry or portion thereof in the Register of Firms.

68. (1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such

statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

69. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

- (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or
 - (b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.
- (4) This section shall not apply—
- (a) to firms or to partners in firms which have no place of business in British India, or whose places of business in British India are situated in areas to which, by notification under section 55, this Chapter does not apply, or
 - (b) to any suit or claim of set-off not exceeding one hundred rupees in value which in the Presidency-towns, is not of a kind specified in section 19 of the Presidency

Small Cause Courts Act, 1882 or outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

70. Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months or with fine, or with both.

71. (1) The Governor-General in Council may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms :

Provided that such fees shall not exceed the maximum fees, specified in Schedule I.

(2) The Local Government may make rules—

- (a) prescribing the form of statement submitted under section 58, and of the verification thereof ;
- (b) requiring statements, intimations and notices under sections 60, 61, 62 and 63 to be in prescribed form, and prescribing the form thereof ;
- (c) prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein ;
- (d) regulating the procedure of the Registrar when disputes arise ;
- (e) regulating the filing of documents received by the Registrar ;
- (f) prescribing conditions for the inspection of original documents ;
- (g) regulating the grant of copies ;
- (h) regulating the elimination of registers and documents :

- (i) providing for the maintenance and form of an Index to the Register of Firms ; and
 - (j) generally, to carry out the purposes of this Chapter.
- (3) All rules made under this section shall be subject to the condition of previous publication.

CHAPTER VIII

Supplemental

72. A public notice under this Act is given—

(a) where it relates to the retirement or expulsion of a partner from a registered firm or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and

(b) in any other case, by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

73. The enactments mentioned in Schedule II are hereby repealed to the extent specified in the fourth column thereof.

74. Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or
- (c) anything done or suffered before the commencement of this Act, or

- (d) any enactment relating to partnership not expressly repealed by this Act, or
- (e) any rule of insolvency relating to partnership, or
- (f) any rule of law not inconsistent with this Act.

SCHEDULE I

Maximum Fees

[See sub-section (1) of section 71.]

| Document or act in respect of which the fee is payable. | Maximum fee. |
|---|---|
| Statement under section 58 . . | Three rupees. |
| Statement under section 60 . . | One rupee. |
| Intimation under section 61 . . | One rupee. |
| Intimation under section 62 . . | One rupee. |
| Notice under section 63 . . | One rupee. |
| Application under section 64 . . | One rupee. |
| Inspection of the Register of Firms under sub-section (1) of section 66. | Eight annas for inspecting one volume of the Register. |
| Inspection of documents relating to a firm under sub-section (2) of section 66. | Eight annas for the inspection of all documents relating to one firm. |
| Copies from the Register of Firms. | Four annas for each hundred words or part thereof. |

SCHEDULE II

Enactments Repealed

(See section 73.)

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|------------|-----------------|---|---|
| 1872 | IX | The Indian Contract Act, 1872. | Exceptions 2 & 3 to section 27. The whole of Chapter XI. |
| * 1920 | Burma Act VIII. | The Burma Registration of Business Names Act, 1920. | The whole. |

The Negotiable Instruments Act, 1887. (No. XXVI of 1881)

An Act to define and amend the law relating to Promissory
Notes, Bills of Exchange and Cheques.
[As modified up to the 1st May, 1935.]

Whereas it is expedient to define and amend the law relating
Preamble. to promissory notes, bills of exchange and cheques;
It is hereby enacted as follows :—

CHAPTER I Preliminary

1. This Act may be called the Negotiable Instruments
Short title. Act, 1881 :

It extends to the whole of British India ; but nothing herein
Local extent. contained affects the Indian Paper Currency Act,
Saving of usages 1871, section 21, or affects any local usage relating
relating to to any instrument in an oriental language ;
hundies etc. Provided that such usages may be excluded by any
words in the body of the instrument which indicate an intention
that the legal relations of the parties thereto shall
Commencement. be governed by this Act; and it shall come into
force on the first day of March, 1882.

2. [*Repeal of enactments.*] *Repealed by the Repealing and
Amending Act, 1891 (XII of 1891).*

3. In this Act—
Interpretation
clause.

“banker” includes also persons or corporation or company
“Banker.” acting as bankers ; and

“notary public” includes also any person appointed by the
Local Government to perform the functions of a

“Notary public.” notary public under this Act.

CHAPTER II

Of Notes, Bills and Cheques

4. A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

Illustrations

A signs instruments in the following terms :

- (a) "I promise to pay B or order Rs. 500."
- (b) "I acknowledge myself to be indebted to B in Rs. 1,000, to be paid on demand, for value received."
- (c) "Mr. B. I. O. U. Rs. 1,000."
- (d) "I promise to pay B Rs. 500 and all other sums which shall be due to him."
- (e) "I promise to pay B Rs. 500, first deducting thereout any money which he may owe me."
- (f) "I promise to pay B Rs. 500 seven days after my marriage with C."
- (g) "I promise to pay B Rs. 500 on D's death, provided D leaves me enough to pay that sum."
- (h) "I promise to pay B Rs. 500 and to deliver to him my black horse on 1st January next."

The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c), (d), (e), (f), (g) and (h) are not promissory notes.

5. A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument.

A promise or order to pay is not "conditional," within the meaning of this section and section 4, by reason of the time for

payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain. The sum payable may be "certain," within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person," within the meaning of this section and section 4, although he is misnamed or designated by description only.

6. A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

7. The maker of a bill of exchange or cheque is called the "Drawer." "drawer," the person thereby directed to pay is called the "drawee."

When in the bill or in any indorsement thereon the name of any person is given in addition to the drawee to be restored to in case of need, such person is called a "drawee in case of need."

After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same or given notice of such signing to the holder or to some person on his behalf he is called the "acceptor."

When a bill of exchange has been noted or protested for non-acceptance or for better security and any person accepts it *supra protest* for honour of the drawer or for any one of the indorsers, such person is called an "acceptor for honour."

The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee."

8. The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

9. "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer,

or the payee or indorsee thereof, if payable to order before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

10. "Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

11. A promissory note, bill of exchange or cheque drawn or made in British India, and made payable in, or drawn upon any person resident in British India, shall be deemed to be an inland instrument.

12. Any such instrument not so drawn, made or made payable shall be deemed to be a foreign instrument.

13. (1) A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i)—A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii) A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

Explanation (iii)—Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

14. When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

15. When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the “indorser.”

16. (1) If the indorser signs his name only, the indorsement is said to be “in blank”, and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be “in full”; and the person so specified is called the “indorsee” of the instrument.

(2) The provisions of this Act relating to a payee shall apply with the necessary modifications to a indorsee.

17. Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly.

18. If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

19. A promissory note or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.

20. Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

21. In a promissory note or bill of exchange the expressions "At sight," "On presentment," "After sight," "at sight" and "on presentment" mean on demand. The expression, "after sight" means, in a promissory note, after presentment for sight, and, in a bill of exchange, after acceptance, or noting for non-acceptance, or protest for non-acceptance.

22. The maturity of a promissory note or bill of exchange is the date at which it falls due.

Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day after the day on which it is expressed to be payable.

23. In calculating the date at which a promissory note or bill of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the month which

of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated, or presented for acceptance or sight, or noted for non-acceptance, or protested for non-acceptance, or the event happens, or, where the instrument is a bill of exchange made payable a stated number of months after sight and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month.

Illustrations

- (a) A negotiable instrument, dated 29th January, 1878, is made payable at one month after date. The instrument is at maturity on the third day after the 28th February, 1878.
- (b) A negotiable instrument dated 30th August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.
- (c) A promissory note or bill of exchange, dated 31st August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.

24. In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded.

25. When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day.

Explanation :—The expression “public holiday” includes Sundays, New Year’s day, Christmas day : if, either of such days falls on a Sunday, the next following Monday : Good Friday ; and any other day declared by the Local Government, by notification in the official Gazette, to be a public holiday.

CHAPTER III

Parties to Notes, Bills and Cheques

26. Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque.

Capacity to make,
etc., promissory
notes, etc.

A minor may draw, indorse, deliver and negotiate such instrument so as to bind all parties except himself.

Nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered.

27. Every person capable of binding himself or of being bound, as mentioned in section 26, may so bind himself or be bound by a duly authorized agent acting in his name.

A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse.

28. An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

29. A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.

30. The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawee as hereinafter provided.

31. The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.

32. In the absence of a contract to the contrary the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

33. No person except the drawee of a bill of exchange or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance.

34. Where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority.

35. In the absence of a contract to the contrary, whoever indorse and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to or received by, such indorser as hereinafter provided.

Every indorser after dishonour is liable as upon an instrument payable on demand.

36. Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied.

37. The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be.

38. As between the parties so liable as sureties, each prior party is in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party.

Illustration

A draws a bill payable to his own order on B, who accepts. A afterwards indorses the bill to C, C to D and D to E. As between E and B, B is the principal debtor, and A, C and D are his sureties. As between E and A, A is the principal debtor, and C and D are his sureties. As between E and C, C is the principal debtor and D is his surety.

39. When the holder of an accepted bill of exchange enters into any contract with the acceptor which, under section 134 or 135 of the Indian Contract Act, 1872, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged.

40. When the holder of a negotiable instrument, without the consent of the indorser, destroys the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.

Illustration

A is the holder of a bill of exchange made payable to the order of B, which contains the following indorsements in blank :—

First indorsement, "B".

Second indorsement, "Peter Williams."

Third indorsement, "Wright & Co."

Fourth indorsement, "John Rozario."

This bill A puts in suit against John Rozario and strikes out, without John Rozario's consent, the indorsements by Peter Williams and Wright & Co. A is not entitled to recover anything from John Rozario.

41. An acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill.

42. An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

Acceptance of bill drawn in fictitious name.

43. A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Negotiable instrument made, etc. without consideration.

Exception I.—No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Exception II.—No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the consideration (if any) which he has actually paid or performed.

44. When the consideration for which a person signed a promissory note, bill of exchange or cheque consisted of money, and was originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionately reduced.

Partial absence or failure of money-consideration.

Explanation.—The drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange or cheque stands in immediate relation with the payee and the indorser with his indorsee. Other signers may by agreement stand in immediate relation with a holder.

Illustration

A draws a bill on B for Rs. 500 payable to the order of A. B accepts the bill, but subsequently dishonours it by non-payment. A sues B on the bill. B proves that it was accepted for value as to Rs. 400, and as an accommodation to the plaintiff as to the residue. A can only recover Rs. 400.

45. Where a part of the consideration for which a person signed a promissory note, bill of exchange or cheque, though not consisting of money, is ascertainable in money without collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.

Partial failure of consideration not consisting of money

45. A. Where a bill of exchange has been lost before it is over-due, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

Holder's right to duplicate of lost bill.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

CHAPTER IV

Of Negotiation

46. The making, acceptance or indorsement of a promissory note, bill of exchange or cheque is completed by delivery.

Delivery.

As between parties standing in immediate relation delivery to be effectual must be made by the party making, accepting or indorsing the instrument, or by a person authorised by him in that behalf.

As between parties and any holder of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.

A promissory note, bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof.

47. Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof.

Exception.—A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens.

Illustrations

(a) A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep for B. The instrument has been negotiated.

(b) A, the holder of a negotiable instrument payable to bearer, which is in the hands of A's banker, who is at the time the banker of B, directs the banker to transfer the instrument to B's credit in the banker's account with B. The banker does so, and accordingly now possesses the instrument as B's agent. The instrument has been negotiated, and B has become the holder of it.

48. Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof.

49. The holder of a negotiable instrument in blank may, without signing his own name, by writing above the indorser's signature a direction to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full; and the holder does not thereby incur the responsibility of an indorser.

50. The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation; but the indorsement may, by express words,

restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser or for some other specified person.

Illustrations

B signs the following indorsements on different negotiable instruments payable to bearer :—

- (a) "Pay the contents to C only."
- (b) "Pay C for my use."
- (c) "Pay C or order for the account of B."
- (d) "The within must be credited to C."

These indorsements exclude the right of further negotiation by C.

- (e) "Pay C."
- (f) "Pay C, value in account with the Oriental Bank."
- (g) "Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C, to the indorser and others."

These indorsements do not exclude the right of further negotiation by C.

51. Every sole maker, drawer, payee or indorsee, or all of several joint makers, drawers, payees or indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in section 50 indorse and negotiate the same.

Who may negotiate.

Explanation.—Nothing in this section enables a maker or drawer to indorse or negotiate an instrument, unless he is in lawful possession or is holder thereof; or enables a payee or indorsee to indorse or negotiate an instrument, unless he is holder thereof.

Illustration

A bill is drawn payable to A or order. A indorses it to B, the indorsement not containing the words, "or order" or any equivalent words. B may negotiate the instrument.

52. The indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

Indorser who excludes his own liability or makes it conditional.

Where an indorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him.

Illustrations

(a) The indorser of a negotiable instrument signs his name adding the words—

“Without recourse”

Upon this indorsement he incurs no liability.

(b) A is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement “without recourse” he transfers the instrument to B, and B indorses it to C, who indorses it to A. A is not only reinstated in his former rights, but has the rights of an indorsee against B and C.

53. A holder of a negotiable instrument who derives title from a holder in due course has the rights therein of that holder in due course.

Holder deriving title from holder in due course.

54. Subject to the provisions hereinafter contained as to crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof even although originally payable to order.

Instrument indorsed in blank.

55. If a negotiable instrument after having been indorsed in blank is indorsed in full, the amount of it cannot be claimed from the indorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person.

Conversion of indorsement in blank into indorsement in full

56. No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but, where such amount has been partly paid a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

Indorsement for part of sum due.

57. The legal representative of a deceased person cannot negotiate by delivery only a promissory note, bill of exchange or cheque payable to order and indorsed by the deceased but not delivered.

Legal representative cannot by delivery only negotiate instrument indorsed by deceased.

58. When a negotiable instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party, prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course.

Instrument
obtained by un-
lawful means or
for unlawful con-
sideration.

59. The holder of a negotiable instrument, who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor :

Instrument
acquired after
dishonour or
when overdue.

Provided that any person who, in good faith and for consideration, becomes the holder, after maturity, of a promissory note or bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party.

Accommodation
note or bill.

Illustration

The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it were not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds but indorsed the bill to A. A's title is subject to the same objection as the drawer's title.

60. A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction.

Instrument
negotiable till
payment or
satisfaction.

CHAPTER V

Of Presentment

61. A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after **Presentment for acceptance.** reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured.

If the bill is directed to the drawee at a particular place, it must be presented at that place; and, if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured.

Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.

62. A promissory note, payable at a certain period after sight, must be presented to the maker thereof **Presentment of promissory note for sight.** for sight (if he can, after reasonable search, be found) by a person entitled to demand payment, within a reasonable time after it is made and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

63. The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, **Drawee's time for deliberation.** allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it.

64. Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such **Presentment for payment.** presentment, the other parties thereto are not liable thereon to such holder.

Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is -

Exception.—Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

Hours for presentment. 65. Presentment for payment must be made during the usual hours of business, and, if at a banker's, within banking hours.

Presentment for payment of instrument payable after date or sight. 66. A promissory note or bill of exchange made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

Presentment for payment of promissory note payable by instalment. 67. A promissory note payable by instalments must be presented for payment on the third day after the date fixed for payment of each instalment; and non-payment on such presentment has the same effect as non-payment of a note at maturity.

Presentment for payment of instrument payable at specified place and not elsewhere. 68. A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place.

Instrument payable at specified place. 69. A promissory note, or bill of exchange, made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place.

Presentment where no exclusive place specified. 70. A promissory note or bill of exchange not made payable as mentioned in sections 68 and 69, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be.

Presentment when maker etc., has no known place of business or residence. 71. If the maker, drawee or acceptor of a negotiable instrument has no known place of business or fixed residence, and no place is specified in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found.

Presentment of cheque to charge drawer. 72. Subject to the provisions of section 84, a cheque must, in order to charge the drawer, be presented at bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer.

Presentment of
cheque to charge
any other person.

73. A cheque must, in order to charge any person except the drawer, be presented within a reasonable time after delivery thereof by such person.

Presentment of
instrument pay-
able on demand.

74. Subject to the provisions of section 31, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder.

Presentment by
or to agent,
representative of
deceased or
assignee of
insolvent.

75. Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker or acceptor, as the case may be, or, where the drawee, maker or acceptor has died, to his legal representative, or, where he has been declared an insolvent, to his assignee.

Excuse for delay
in presentment
for acceptance
or payment.

75.A. Delay in presentment for acceptance or payment is excused if the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made within a reasonable time.

76. No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases :—

(a) if the maker, drawee or acceptor intentionally prevents the presentment of the instrument, or,

if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or,

if the instrument being payable at some other specified place, neither he nor any person authorised to pay it attends at such place during the usual business hours, or,

if the instrument not being payable at any specified place, he cannot after due search be found ;

(b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment ;

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented—

he makes a part payment on account of the amount due on the instrument

or promises to pay the amount due thereon in whole or in part,

or otherwise waives his right to take advantage of any default in presentment for payment ;

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

77. When a bill of exchange accepted payable at a specified bank, has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss

Liability of
banker for
negligently
dealing with bill
presented for
payment.

CHAPTER VI.

Of Payment and Interest

78. Subject to the provisions of section 82, clause (c), payment of the amount due on a promissory note, bill of exchange or cheque must in order to discharge the maker or acceptor, be made to the holder of the instrument.

To whom
payment should
be made.

79. When interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount, or until such date after the institution of a suit to recover such amount as the Court directs.

Interest when
rate specified.

80. When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

Interest when
no rate specified.

Explanation.—When the party charged is the indorser of an

instrument dishonoured by non-payment he is liable to pay interest only from the time that he receives notice of the dishonour.

81. Any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange or cheque is, before payment, entitled to have it shown, and is on payment entitled to have it delivered up to him, or if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him.

Delivery of
instrument on
payment, or
indemnity in
case of loss.

CHAPTER VII.

Of Discharge from Liability on Notes, Bills and Cheques

82. The maker, acceptor or indorser respectively of a negotiable instrument is discharged from liability thereon—

(a) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder ;

(b) to a holder thereof who otherwise discharges such maker, acceptor or indorser, and to all parties deriving title under such holder after notice of such discharge :

(c) to all parties thereto, if the instrument is payable to bearer or has been indorsed in blank, and such maker, acceptor or indorser makes payment in due course of the amount due thereon.

83. If the holder of a bill of exchange allows the drawee more than forty-eight hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

84. (1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of

When cheque
not duly
presented and
drawer damaged
thereby.

damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of the cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him.

Illustrations

(a) A draws a cheque for Rs. 1,000, and, when the cheque ought to be presented, has funds at the bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque.

(b) A draws a cheque at Ambala on a bank in Calcutta. The bank fails before the cheque could be presented in ordinary course. A is not discharged, for he has not suffered actual damage through any delay in presenting the cheque.

Cheque payable to order. 85. (1) Where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharged by payment in due course.

(2) Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

Drafts drawn by one branch of a bank on another payable to order. 85-A. Where any draft, that is an order to pay money drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by the payment in due course.

86. If the holder of a bill of exchange acquiesces in a qualified ~~Courtesy~~ ^{Concurrence}, or one limited to part of the sum mentioned in the ~~Ex.~~

Parties not consenting discharged by qualified or limited acceptance. bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent is not obtained to

such acceptance are discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance.

Explanation.—An acceptance is qualified—

- (a) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated ;
- (b) where it undertakes the payment of part only of the sum ordered to be paid ;
- (c) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere ; or where a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere ;
- (d) where it undertakes the payment at a time other than that at which under the order it would be legally due.

87. Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties ;

and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86 and 125.

88. An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument.

89. Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered ;

or where a cheque is presented for payment which appears to

at the time of presentation appear to be crossed or to have had a crossing which has been obliterated,

payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon; and such payment shall not be questioned by reason of the instrument having been altered or the cheque crossed.

90. If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.

Extinguishment of rights of action on bill in acceptor's hands.

CHAPTER VIII.

Of Notice of Dishonour

91. A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted.

Dishonour by non-acceptance.

Where the drawee is incompetent to contract, or the acceptance is qualified, the bill may be treated as dishonoured.

92. A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.

Dishonour by non-payment.

93. When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or nonpayment, the holder thereof, or some party thereto who remains liable thereon, must give notice that instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

By and to whom notice should be given.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque.

94. Notice of dishonour may be given to duly authorised agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or where he has been declared an insolvent, to his assignee ;
 Mode in which notice may be given. may be oral or written ; may, if written, be sent by post ; and may be in any form ; but it must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon ; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

95. Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time, unless such party otherwise receives due notice as provided by section 93.

96. When the instrument is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour.

When party to whom notice given is dead 97. When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient.

When notice of dishonour is unnecessary. 98. No notice of dishonour is necessary—

- (a) when it is dispensed with by the party entitled thereto ;
- (b) in order to charge the drawer when he has countermanded payment ;
- (c) when the party charged could not suffer damage for want of notice ;
- (d) when the party entitled to notice cannot after due search be found ; or the party bound to give notice is,

for any other reason, unable without any fault of his own to give it :

- (e) to discharge the drawers when the acceptor is also a drawer ;
- (f) in the case of a promissory note which is not negotiable :
- (g) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

CHAPTER IX.

Of Noting and Protest

99. When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument, or upon a paper attached thereto, or partly upon each.

Noting.

Such note must be made within a reasonable time after dishonour, and must specify the date of dishonour, the reason, if any, assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the notary's charges.

100. When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest.

Protest.

When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor and on its being refused may, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a protest for better security.

Protest for better security.

Contents for protests.

101. A protest under section 100 must contain—

- (a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon :

- (b) the name of the person for whom and against whom the instrument has been protested ;
- (c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public ; the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found ;
- (d) when the note or bill has been dishonoured, the place and time of dishonour, and, when better security has been refused, the place and time of refusal ;
- (e) the subscription of the notary public making the protest ;
- (f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person for whom, and the manner in which, such acceptance or payment was offered and effected.

A notary public may make the demand mentioned in clause (c) of this section either in person or by his clerk or, where authorized by agreement or usage, by registered letter.

102. When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions ; but the notice may be given by the notary public who makes the protest.

103. All bills of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, and which are dishonoured by non-acceptance, may, without further presentment to the drawee, be protested for non-payment in the place specified for payment, unless paid before or at maturity.

104. Foreign bills of exchange must be protested for dishonour when such protest is required by the law of the place where they are drawn.

104-A. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or taking of the proceeding ; and the formal protest may be extended at any time thereafter as of the date of the noting.

CHAPTER X

Of Reasonable Time

105. In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments ; and, in calculating such time public holidays shall be excluded.

106. If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour.

If the said parties carry on business or live in the same place such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour.

107. A party receiving notice of dishonour, who seeks to enforce his right against a prior party, transmits the notice within a reasonable time if he transmits it within the same time after its receipt as he would have had to give notice if he had been the holder.

CHAPTER XI

Of Acceptance and Payment for Honour and Reference in Case of Need

108. When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto.

109. A person desiring to accept for honour must, by writing

How acceptance for honour must be made. on the bill under his hand declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour.

110. Where Acceptance not specifying for whose honour it is made. the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer.

111. An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee do not : and such Liability of acceptor or for honour. party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance.

But an acceptor for honour is not liable to the holder of the bill unless it is presented (or in case the address given by such acceptor on the bill is a place other than the place where the bill is made payable), forwarded for presentment, not later than the day next after the day of its maturity.

112. An acceptor for honour cannot be charged unless the bill has at its maturity been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour.
When acceptor for honour may be charged.

113. When a bill of exchange has been noted or protested for non-payment, any person may pay the same for the honour of any party liable to pay the same, provided that the person so paying or his agent in that behalf has previously declared before a notary public the party for whose honour he pays, and that such declaration has been recorded by such notary public.
Payment for honour.

114. Any person so paying is entitled to all the rights in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honour he pays all sums so paid, with interest thereon and with all expenses properly incurred in making such payment.
Right of payer for honour.

115. Where a drawee in case of need is named in a bill of exchange, or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.
Drawer in case of need.

116. A drawee in case of need may accept and pay the bill
Acceptance and of exchange without previous protest.
payment without
protest.

CHAPTER XII

Of Compensation

117. The compensation payable in case of dishonour of a
promissory note, bill of exchange, or cheque, by
Rules as to com- any party liable to the holder or any indorsee,
pensation. shall be determined by the following rules :—

- (a) the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it ;
- (b) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places ;
- (c) an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment ;
- (d) when the person charged and such indorser reside at different places, the indorser is entitled to receive such sum at the current rate of exchange between the two places ;
- (e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

CHAPTER XIII

Special Rules of Evidence.

118. Until the contrary is proved, the following presumptions shall be made —
Presumptions as to negotiable instruments —

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, of consideration ; when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration ;

(b) that every negotiable instrument bearing a date was made or drawn on such date ;
as to date ,

(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its acceptance , maturity ,

(d) that every transfer of a negotiable instrument was made before its maturity ,
as to time of transfer ;

(e) that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon ;
as to order of indorsement

(f) that a lost promissory note, bill of exchange or cheque was duly stamped ;
as to stamp

(g) that the holder of a negotiable instrument is a holder in due course , Provided that where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.
that holder is a holder in due course.

119. In a suit upon an instrument which has been dishonoured, the Court shall, on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.
Presumption on proof of protest.

120. No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn

Estoppel against denying original validity of instrument

121. No maker of a promissory note and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny to payee's capacity, at the date of the note or bill, to indorse the same

Estoppel against denying capacity of payee to indorse.

122. No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument

Estoppel against denying signature or capacity of prior party

CHAPTER XIV

Of Crossed Cheques

123 Where a cheque bears across its face an addition of the words "and company or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally

Cheque crossed generally.

124. Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

Cheque crossed specially

125 Where a cheque is uncrossed, the holder may cross it generally or specially.

Crossing after issue.

Where a cheque is crossed generally, the holder may cross it specially

Where a cheque is crossed generally or specially, the holder may add the words "not negotiable"

Where a cheque is crossed specially, the banker to whom it is

crossed may again cross it specially to another banker, his agent, for collection.

126. Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than generally to a banker.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection.

127. Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is more than once drawn shall refuse payment thereof.

128. Where the banker on whom a crossed cheque is drawn has paid the same in due course, the banker paying the cheque, and (in case such cheque has come to the hand of the payee) the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

129. Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

130. A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

131. A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

Explanation.—A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

CHAPTER XV

Of Bills in Sets*

132. Bills of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the other remains unpaid.

Set of bills. All the parts together make a set ; but the whole set constitutes only one bill, and is extinguished, when one of the parts, if a separate bill, would be extinguished.

Exception.—When a person accepts or indorses different parts of the bill in favour of different persons, he and the subsequent indorsers of each part are liable on such part as if it were a separate bill.

133. As between holders in due course of different parts of the same set he who first acquired title to his part is entitled to the other parts and the money represented by the bill.

Holder of first
acquired part
entitled to all.

CHAPTER XVI,

Of International Law

134. In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable.

Law governing
liability of
maker, acceptor
or indorser of
foreign
instrument.

Illustration

A bill of exchange was drawn by A in California, where the rate of interest is 25 per cent. and accepted by B, payable in

Washington, where the rate of interest is 6 per cent. The bill is indorsed in British India, and is dishonoured. An action on the bill is brought against B in British India. He is liable to pay interest at the rate of 6 per cent only; but, if A is charged as drawer, A is liable to pay interest at the rate of 25 per cent.

135. Where a promissory note, bill of exchange or cheque is made payable in a different place from that in which it is made or indorsed, the law of the place where it is made payable determines what constitutes dishonour and what notice of dishonour is sufficient.

Illustration

A bill of exchange drawn and indorsed in British India, but accepted payable in France, is dishonoured. The indorsee causes it to be protested for such dishonour, and gives notice thereof in accordance with the law of France, though not in accordance with the rules herein contained in respect of bills which are not foreign. The notice is sufficient.

136. If a negotiable instrument is made, drawn, accepted or indorsed out of British India, but in accordance with the law of British India, the circumstance that any agreement evidence by such instrument is invalid according to the law of the country wherein it was entered into does not invalidate any subsequent acceptance or indorsement made thereon in British India.

137. The law of any foreign country regarding promissory notes, bills of exchange and cheques shall be presumed to be the same as that of British India unless and until the contrary is proved.

CHAPTER XVII

Notaries Public

138. The Local Government may, from time to time, by notification in the official Gazette, appoint any person, by name or by virtue of his office, to be a notary public under this Act and to exercise his

functions as such within any local area ; and may, by like notification, remove from office any notary public appointed under this Act.

139. The Local Government may, from time to time, by Powers to make notification in the official Gazette make rules rules for notaries consistent with this Act for the guidance and public. control of notaries public appointed under this Act, and may, by such rules (among other matters), fix the fees payable to such notaries

SCHEDULE

[*Enactments repealed.*]

*Repealed by the Repealing and Amending Act, 1891
(XII of 1891)*

APPENDIX UNIVERSITY QUESTIONS

CHAPTER I Law of Contract

1. "Contract is an agreement enforceable by Law" Discuss C U B Com 1938
2. What are essentials of a valid contract? Can there be tacit acceptance of an offer? C U B Com 1930
3. Discuss the essential elements of a valid contract C U B Com 1925 1935
4. Explain the formal contracts of English Law. Is there any formal contract in India? C U M Com 1943
5. When is time the essence of a contract? Is the fixing of a date for the performance of a contract conclusive of the matter? C, U M Com 1943
6. A offers a reward to whosoever shall bring to him his lost dog. B brings to A his lost dog. Can B claim the reward? Give reasons. C U P Com 1928
7. When is an offer complete? How and when can an offer be revoked? A proposes by a letter sent by post to sell his house to B. B accepts the proposal by a letter sent by post. When can B revoke his acceptance? C U B Com 1936
8. Under what circumstances may an offer be revoked? What is communication of acceptance? C U B Com 1925
9. "A mere mental acceptance not evidenced by words or conduct is in the eye of law no acceptance" Comment C U B Com 1932.
10. How can you accept an offer by acting on it? C U B Com 1933, 1935
11. Can an acceptance which does not reach the offeror bind the offeror? An offer was made to take shares indicating that the answer was to come by post. It was accepted by letter, but the letter never reached the offeror. Is the offeror liable as a shareholder? C. U. M Com 1938
12. F offered by letter to buy N's horse for Rs 500/- adding that if he heard no more about the matter he would consider the horse as his. The answer was returned to this letter, but N told B, his auctioneer, to keep the horse out of sale, as it was sold to F. B sold the horse by mistake. F sued B for conversion of his property. Give your decisions C. U. M Com. 1939.
13. A letter of acceptance is put into the post office. Subsequently

telegram revoking the acceptance is sent and reaches the offeror before the letter. Is the acceptance revoked?

Is the communication of acceptance always necessary? C. U. M.Com 1941.

14. (a) Acceptance must be something more than a mere mental assent. Illustrate.

(b) Explain the rule, 'Offer determines mode of acceptance,' with reference to contracts by post C U M.Com. 1944

15. Explain clearly the law relating to communication of offer and acceptance in the law of contract C U B.Com 1939.

A writes a letter from 10, Clive Street, Calcutta to B in Agra proposing to B to sell his house at Calcutta for Rs. 20,000/. A's letter concludes as follows: "If you accept my proposal, please communicate your acceptance by telegram to my address at 10, Clive Street." Due to cyclone the telegraph office at Agra cannot function. B writes back to A agreeing to his proposal. A refuses to sell the house to B. Has B any remedies against A? What would be your answer if B communicates his acceptance by telegram to A, but the telegram does not reach A, A having left Calcutta due to bombing from the air? C U B.Com. 1943

17. "Contract is an agreement enforceable by law" Discuss Distinguish between void, voidable and unenforceable contracts C U B.Com. 1929

18. Explain the legal nature of the relation between the Parties in the following cases:—

(a) A made a contract with B and promised that if he was satisfied with him as a customer he would favourably consider an application for renewal of the contract

(b) X said in course of conversation with Y that he would give Rs 5,000/- to him who would marry his daughter with his consent. Y married X's daughter with X's consent C U M.Com 1940

19. On the 28th June, A offers to take share in a company. On the 23rd of November his offers were accepted. A refused to take the shares. Advise the company. C U B.Com 1929

20. Discuss fully the rules relating to offer and acceptance through post. To what extent are infants' contracts protected? C U B.Com. 1942.

21. What is the position in law of infants' contracts? C U. B.Com 1939

22. Discuss fully the law relating to infants' contracts under the Indian law, C U. B.Com 1943.

23. What is the law in India regarding the infants' contracts? C. U B.Com. 1941.

24. Discuss fully the law relating to infants' contracts according to

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- Indian law. Is the English law on the point the same? C M.Com. 1942.
25. Is a minor's contract valid under Indian Contract Act? Under what circumstances is an infant bound by the contract for necessities? C. U. B.Com. 1926.
 26. Define consideration. What are the points of difference between the English law and the Indian law on the subject of consideration for a contract. C U. B.Com. 1931.
 27. What do you understand by consideration? A sells 5 bighas of land in Calcutta for Rs. 5/- to B. Is this contract a valid contract? B desires to have it set aside. Can he do so? Under what circumstances? Describe fully agreements without considerations which are enforced by courts in India. C. U. B.Com. 1944.
 28. Discuss fully: "Agreements made without consideration are void." Are there any exceptions to the rule? C. U. B.Com. 1939.
 29. State the exceptions to the general rule of law in India that an agreement made without consideration is void. C. U. B.Com. 1925.
 30. A writes to B—"At the risk of your own life you saved me from a serious motor accident. I promise to pay you Rs. 10,000/-. A does not pay B. Advise Parties. C U. B.Com. 1928:
 31. (a) Consideration may be executory or executed; it must not be past. Discuss. B.Com. 1945.
(b) A promises to drop a prosecution which he has instituted against B for theft, and B promises to restore the value of things. Examine the nature of the agreement. C U. M.Com. 1940.
 32. (a) Consideration need not be adequate to the promise, but must be of some value in the eye of law. Explain
(b) Can an agreement be valid without consideration? C U M.Com. 1941
 33. How far is it true to say that an agreement made without consideration is void? A agrees with B to sell a house worth Rs. 10,000/- for Rs. 10/-. A does not sell. Can B bring an action against A in the court? Advise B. C U M.Com. 1942
"A past consideration is no consideration." Discuss with reference to both English and Indian law. C. U. B.Com. 1929, 1933, 1937.
 34. A agreed to let his theatre to B for a show in connection with Mayor's fund. Before the date of entertainment the hall was destroyed by accidental fire. Advise the parties. C U. B.Com. 1928, 1929, 1930.
 35. Henry agreed to hire a flat to view the coronation procession on the 26th June, 1902. Owing to king's illness the procession was abandoned before the 26th June. Is Henry liable for the rent of the flat? C. U. B.Com. 1929.
 36. How far are the liabilities of the parties to a contract affected by supervening impossibilities? C. U. B.Com. 1932, 1933

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38. A agrees to sell B a specific cargo of goods per S.S. "Malwa" supposed to be on its way from London to Bombay. It turns out that before the day of bargain S.S. "Malwa" had been cast away and the goods lost. Discuss the rights of A and B. C. U. B.Com. 1933.
39. A agrees to buy from B a certain elephant. It turns out that the elephant was dead at the time of the bargain, though neither party was aware of the fact. Discuss the rights of A and B. C. U. B.Com. 1934.
40. Explain the law relating to agreement in restraint of trade. C. U. B.Com. 1925, 1932.
How far courts in India uphold agreements in restraint of trade? C. U. B.Com. 1938.
42. Write notes on contracts which law will not enforce. C. U. B.Com. 1930.
43. What is an agreement by way of wager? Is such an agreement void or illegal? C. U. B.Com. 1925.
44. A hired B's room for a series of lectures. B discovers that the lectures would be of seditious nature and declined to allow A to use the room. Discuss B's prospects in litigation. C. U. B.Com. 1928.
45. Distinguish between void and voidable contracts. Describe agreements which are void under Indian Contract Act. C. U. B.Com. 1941.
46. Distinguish between void and voidable contracts. State whether the following agreements are void or valid :—(a) A promises B in consideration of Rs. 1000/- never to marry throughout his life. (b) A promises to pay a certain sum of money to B who is an intended witness in a suit against A, in consideration of B's absconding himself at the trial. C. U. B.Com. 1931.
47. Under what circumstances does (a) fraud (b) misrepresentation vitiate contracts under the Indian law? What is the difference between Indian law and English law regarding consideration? C. U. B.Com. 1941.
48. (a) When is a contract voidable, and when void? (b) A fraudulently informs B that A's house is free from incumbrances. B thereupon buys the house. The house is subject to a mortgage. What are the rights of B? C. U. B.Com. 1934.
49. B being led to think that C is D and that he is selling to D sends goods to C. C sells the goods to E. Discuss the nature of E's right to the goods. C. U. M.Com. 1932.
50. A telegraph company by mistake in the transmission of a message, caused X to ship to India large quantities of barley which was not required, and which, owing to a fall in the market price, resulted in a heavy loss. X sued the telegraph Company for damages for misrepresentation. Can he succeed? C. U. M.Com. 1939.
51. A sells X a piece of silk. X thinks it is Indian silk. A knows that

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- X thinks so, but knows that it is not Indian silk. Examining the nature of the contract. C. U. M.Com. 1939.
52. Distinguish innocent misrepresentation from fraud. D by misrepresentation induces X to sell a motor car to him and thereafter sells it to Y. Examine the nature of Y's title to the car. C. U. B.Com. 1943.
53. How can a contract be affected by undue influence? A, a money-lender advances Rs. 100/- to B, a farmer, and by undue influence, induces B to sign a promissory note for Rs. 200/- with interest at 6 p.c. per month. Can A recover the amount of the promissory note? If so, what amount and interest? C. U. B.Com. 1936.
54. A grants lease of certain premises at Calcutta to B for one year knowing that the premises will be used for the purpose of (a) prostitution, (b) installing machinery for minting base coins, at a monthly rental of Rs. 500/. B does not pay the rent. Advise A. C. U. B.Com. 1937.
55. Discuss the legality or the validity of the following contracts :—
 (a) (i) A German, (ii) a Russian enters into a contract with a British subject (1) prior to the declaration of the present war, (2) during the continuance of this war.
 (b) X, a farmer, simply exhibits oats in the belief that they are old oats. Is the contract enforceable? C. U. B.Com. 1940.
56. What elements are essential to make a contract a contingent one? ✓ C. U. B.Com. 1926.
57. State the various modes in which a contract may be discharged. C. U. B.Com. 1925, 1938.
58. State the different modes in which a man may be discharged from the obligations of a contract. C. U. B.Com. 1929.
59. What are the remedies for breach of contract? C. U. B.Com. 1930. ✓
60. What are the rights and liabilities of parties in case of an anticipatory breach of contract? C. U. B.Com. 1933.
61. How are damages for breach of contract assessed? C. U. B.Com. 1935.
62. (a) X having contracted with Y to supply Y with 1000 tons of iron at Rs. 100/- a ton, to be delivered at a stated time, contracts with Z for the purchase of 1000 tons of iron at Rs. 80/- a ton. Z fails to perform his contract with X, who cannot procure other iron, and Y, in consequence, rescinds the contract. What damages can X claim from Z?
 (b) A contracts with B to pay Rs. 1000/- if he fails to pay Rs. 500/- on a given day. A fails to pay B Rs. 500/- on that day. B sues on the contract. Give your decision. C. U. M.Com. 1944.
63. Distinguish between liquidated damages and penalty. C. U. B.Com. 1939.
64. Distinguish between liquidated damages and penalty. What do you mean by Quantum meruit?

A supplies food to B, wife of C. who is a lunatic. C has assets worth one lac. On non-payment can A proceed against the assets of C? Would your answer be the same if C instead of being a lunatic is an infant?

65. Explain :—Novation.

Liquidated damages.

Caveat Emptor. C. U. B.Com. 1937.

66. Define 'bailment' and briefly state the responsibilities of the bailor and the bailee. C. U. B.Com. 1925
67. Define 'Pledge' and state respective rights and duties of the Pledger and the Pledgee. C. U. B.Com. 1926
68. Distinguish between a Pledge, Mortgage and Lien. C. U. B.Com. 1928, 1932.
69. What is bailment? What is the extent of the liability of a Railway Company in India as a bailee? Does the liability of such a company differ in English Law? If so, to what extent? C. U. B.Com. 1931.
70. What is a bailment? When is a Railway Company liable to the passenger for the loss of his luggage? C. U. B.Com. 1932
71. (a) What is the standard of care a bailee has to take in respect of goods bailed to him? C. U. B.Com. 1933.
72. Distinguish between a contract of guarantee and a contract of Indemnity C. U. B.Com. 1926, 1929, 1930, 1931, 1933, 1935, 1937, 1941
73. (a) What is bailment? (b) A hires a motor car of B. The car is unsafe though B is not aware of it and A is injured. What are the rights of A? C. U. B.Com. 1934.
74. Explain the legal positions and rights of a finder of goods and those of a pawnee in respect of goods pledged by a mercantile agent. C. U. M.Com. 1943
75. What do you mean by bailee's particular lien? What are C.I.F. contracts? Discuss fully the rules of law relating to wrong quality. C. U. M.Com. 1942.
76. (a) When is a surety discharged from his liabilities?
(b) A contracts with B for a fixed price to build a house for B within 6 months, B supplying the necessary timber C guarantees A's performance of the contract, B fails to supply the timber. Discuss the liabilities of C C. U. B.Com. 1934.
77. A sells and delivers 100 bales of cotton to B. C afterwards, without consideration, agrees to pay for them in default of B. What are the rights of A against C? C. U. B.Com. 1935.
78. B owes C a debt guaranteed by A. Debts become payable. C does not sue B and allows his remedy against B to become barred by limitation. Discuss the rights of C against A on the guarantee. C. U. B.Com. 1936.

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79. What are the conditions of valid ratification? What is breach of warranty or authority? C. U. B.Com. 1925.
80. What is meant by suing on Quantum meruit? C. U. 1928, 1931, 1932, 1939.
81. A cutter was engaged for a lump sum of £30 to serve as a mate on a voyage from Jamaica to Liverpool. He died after two thirds of the voyage. His sons claimed payments for what he had done up to the time of his death. Will they succeed? C. U. B.Com. 1930.
82. A enters into a contract with B for creation of a two-storeyed building in Calcutta for B for the sum of Rs. 20,000/-. A completes the ground floor but owing to the lack of materials he is unable to proceed further. A demands Rs. 10,000/- for having completed the ground floor. Is his claim maintainable in law?

Would your answer be different if A contracts with B to sell to him 5000 maunds of paddy at Rs. 4/ per maund, sells and delivers to B 1000 maunds of paddy, being unable to sell to B further quantity of paddy. Can A demand of B the sum of Rs. 4000/-? C. U. B.Com. 1943.

83. State briefly the rules governing the measures of damages for breach of contract. C. U. B.Com. 1926.
84. State briefly the rules of law under which damages arising out of a breach of contract are assessed. Are the damages not arising naturally but from circumstances peculiar to the special case recoverable? If so, under what conditions? C. U. B.Com. 1927.
85. Who is an agent according to law or contract? Describe the duties of agents to their principals.

A, a whole-sale merchant authorises his agent B to purchase paddy from Behar for 2 lacs of rupees. B does not purchase paddy; it is not available in Behar. He purchases wheat worth the same amount from C. B does not pay. Has C any remedies against A or B or A and B? C. U. B.Com. 1944.

86. Discuss briefly the duties of the agent to the principal. What do you mean by an undisclosed principal? What is the legal position of a sub-agent to (a) the agent, (b) the principal? C. U. B.Com. 1943.
87. (a) What do you understand by "undisclosed principal"? What are the rights and liabilities of such a principal?

(b) A enters into a contract with B to sell 50 maunds of rice and afterwards discovers that B was acting as agent for C. Whom can A sue for price of the rice? C. U. B.Com. 1934.

88. What is the position of an undisclosed principal? When is an agent personally liable? C. U. B.Com. 1932.
89. What are the rights and liabilities of parties in cases of contracts through agents when the principal is undisclosed? C. U. B.Com. 1938.

90. What are chief duties of an agent? What degree of diligence must an agent show in discharge of his duties? C U B Com 1926
91. When is an agent personally liable for the contracts entered into by him on behalf of the principal? C. U B Com 1928
92. What are the rights of an agent against his principal? C U B Com 1929
93. (a) Is the principal liable for the fraud of the agent committed for benefit of the agent?
(b) A being B's agent for the sale of goods induces C to buy them by a misrepresentation, which he was not authorised to make. Explain the effect of the contract between B & C. C U M Com 1938
94. A instructs B, a merchant to buy a ship for him. B employs a ship surveyor to choose a ship for A. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy and is lost. A sues B for damages. Give your decision. C U M Com 1939
95. Explain the principle laid down in the case of Adam vs Lindsell. C U M Com 1939
96. (a) B at the request of A sells goods in the possession of A and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. What remedy, if any has B against A?
(b) A employs B as bricklayer in building a house. B in the course of the work falls down and is hurt. What remedy, if any, has B against A? C U M Com 1939
97. (a) X, the proprietor of a newspaper publishes at Y's request a libel upon Z in the paper. Y agrees to indemnify X against the consequences of publication. X is sued and has to pay damages. Explain the nature of Y's liability to X.
(b) A consigns goods to B for sale and gives him instructions not to sell under a fixed price. C enters into contract with B to buy the goods at a price lower than the reserved price. Is A bound by the contract? C U M Com 1941
98. (a) X who owes Y Rs 500/-, sells Rs 1000/- worth of rice to Y. X is acting as agent for Z in the transaction. Z, the principal, sues Y for the price of the rice. Examine the nature of his claim.
(b) A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. Advise A as to the person against whom he should bring a suit for the price of the cotton. C U. M Com 1944
99. When is an agent personally liable for contract entered into by him? C. U B Com 1930.
100. A enters into contract with B to sell him 100 maunds of sugar. A afterwards discovers that B was acting as agent for C. What are the rights of A in respect of price of sugar? C U. B. Com. 1935

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101. X, the wife of A is in the habit of buying goods from C. She does not pay C the price of the goods purchased. Can C make X liable? What defences, if any, are open to X? C. U. B.Com. 1942.
102. What is the effect of agency on contracts with third parties? C. U. B.Com. 1936.
103. What are the limits of the right of indemnity of an agent against his principal? C. U. B.Com. 1936.
104. A, a merchant, entrusts B, his agent with a bill of lading relating to certain goods, and instructs B not to sell the goods for less than a certain price and not to give credit to D. B sells the goods to D for less than that price and gives D three months' credit. Explain the nature of the right, if any, acquired by D to the goods. C. U. M.Com. 1938.

CHAPTER II

Sale of Goods

1. What is a "warranty"? Distinguish a warranty from a condition. Is there any, and if so, what condition or warranty is implied in a sale of goods by sample? C U B.Com 1926
2. Differentiate between a condition and a warranty, and illustrate your answer with examples. C U B.Com 1927
3. A contracts to sell B Java sugar according to sample produced by him. The sugar when delivered agrees with the sample but is not Java sugar. Has B got any remedies? C U B.Com 1937
4. X, a farmer, simply exhibits oats in his farm. Y buys the oats in the belief that they are old oats. In fact, they are not old oats. Is the contract enforceable? C U B.Com 1940
5. In a contract for the sale of goods when does (a) the property, and (b) the risk of goods pass from the seller to the buyer? C U B.Com 1925
6. When and how does property pass in a contract for sale of unascertained goods? C U B.Com 1932 1933 1935
7. When and how does property pass in a contract for the sale of unascertained goods. A shipbuilder contracts to sell to B for a stated price a vessel lying in A's yard, the vessel is to be rigged and fitted for a voyage and the price to be paid on delivery. Has the property in the vessel passed to B? C U B.Com 1934
8. Goods are delivered to the buyer on "approval". When does the property in the goods pass to the buyer? C U B.Com 1935
9. Has the property in the goods been transferred in the following cases?
 - (a) B offers for a horse Rs 1000/-, the horse to be delivered on the 5th January, and the price to be paid on the 1st February following.
 - (b) B orders A, a boat builder, to make him a boat. While the boat is building, B pays to A money from time to time on account of price. C U M.Com 1940
10. (a) B buys from A, a furniture maker, a cabinet for Rs. 500/-, pays the whole amount of price, and informs A that he will take the cabinet away after a fortnight. A thereafter sells the cabinet to C and receives payment in cash. Examine the nature of C's title to the cabinet.
 - (b) Can a joint owner of goods sell them and convey a good title to the purchaser? C U M.Com. 1941
11. Distinguish a seller's right of lien over goods from his right of ~~stoppage~~ in transit.

- * (b) Discuss the rules relating to the passing of property in the case of sale of specific goods C U M Com. 1944
12. What is a seller's Lien? When does it arise? Explain with illustration. C U B Com 1925, 1934
13. What do you understand by the right of re-sale? What is stoppage in transit? C U B Com 1940
14. What is the right of stoppage in transit? By whom is it exercisable and what is the effect of its exercise? C U B Com 1926, 1927
15. What is "Stoppage in Transit"? What are the rights of a seller with regard to goods in transit? C U B Com 1936, 1939
16. B at Delhi orders goods of A at Calcutta. A consigns and forwards the goods to B at Delhi. On arrival there, they are taken to a warehouse of B and left there. B refuses to receive them and stops payment. A wants to exercise the right of stoppage in transit. What is your advice? "How stoppage is effected"? C U B Com 1930.
17. Distinguish between a vendor's lien and stoppage in transit. C. U. B Com 1932
18. What are the rights of a seller (a) against the goods, (b) against the buyer? C U B Com 1929
19. What are the rights of an unpaid vendor in respect of goods sold by him? C U B Com 1933
20. A sells to B a quantity of sugar in A's warehouse. It is agreed that B shall get two months credit. B allows the sugar to remain in A's warehouse. B becomes insolvent before the expiry of the two months, and the official assignee demands delivery of the sugar without offering to pay. What are the rights of A? C U B Com. 1936
21. 'No seller of goods can give the buyer of goods a better title to those goods than he himself has.' Discuss. Are there any exceptions to this rule? What are they? C U B Com 1938, 1941
22. Write notes on (a) A factor differs from a broker in important respects, (b) an auctioneer is primarily an agent for the seller but he is an agent for the buyer also. C U B Com 1940, 1941.
23. Write notes on—(a) Caveat Emptor, (b) Re-sale (c) Seller's Lien, (d) Good will. C U B Com 1937
24. What do you mean by Caveat Emptor? What are the rights of the unpaid seller against the buyer? C U B Com 1943
25. Discuss the difference between—(a) A factor, (b) Broker, (c) Auctioneer, (d) Del credere Agent. C U B Com. 1926
26. 'No one can give that which he has not got.' Do you agree? Are there exceptions to this maxim of law regarding the sale of goods? If so, fully discuss them. C U B Com 1940
27. Explain the following—(a) Stoppage in transit (b) Re-sale, (c) Del credere Agent. C U B Com 1931, 1940

CHAPTER III

Partnership

1. Define a partnership and distinguish it from joint family business. G. U. B.Com. 1925.
2. Distinguish between a joint Hindu family firm and a partnership. C. U. B.Com. 1933.
3. How does a joint Hindu family firm differ from a contractual partnership? Must a firm be registered? What are the effects of non-registration? C. U. B.Com. 1940.
4. Discuss fully the relations of partners to third parties. Under what circumstances does a partnership stand dissolved? C. U. B.Com. 1944.
5. Explain the position and rights of a minor under the law of partnership. What is the effect of an agreement of partnership entered into by the guardian, with a third party to make him a partner on behalf of his ward? C. U. M.Com. 1938.
6. Does a notice given to the partner bind the firm? Can a partner bind the firm by an admission or representation made by him? C. U. M.Com. 1940.
7. (a) Can a firm be liable for the wrongful act of a partner?
(b) Explain the legal position of the transferee of a partner's share. C. U. M.Com. 1941.
8. Discuss the rights and liabilities of the members of a partnership firm. C. U. B.Com. 1928.
9. Write an essay on the mutual rights and duties as between partners in a firm. C. U. B.Com. 1929.
10. State the general rules relating to the mutual relations of partners. C. U. B.Com. 1930.
11. Mention in detail the acts for which a partner has implied authority to bind the firm. For what acts is the authority to bind the firm not implied? C. U. B.Com. 1926.
12. Distinguish between (a) a company, (b) a corporation, (c) a partnership. C. U. B.Com. 1927.
13. Distinguish between a Joint Stock Company and a partnership. C. U. B.Com. 1939.
14. A and B who are partners borrowed money from C. Eventually C sued them on the loan and obtained a decree which was not satisfied. Subsequently C discovered that D was a partner with A and B at the date of loan. Discuss the rights of the parties. C. U. B.Com. 1927.
15. What do you understand by the principles of "holding out" in case of partnership? C. U. B.Com. 1934.

16. Explain the doctrine of "Holding out" in reference to the relations of partners to third parties. On what grounds may a court dissolve a firm? C. U. M.Com. 1942.
17. What are the effects of the non-registration of firms? C. U. M.Com. 1942.
18. Compare the rights of a transferee of a partner's share with those of a minor admitted to the benefit of a partnership. C. U. M.Com. 1943.
19. (a) Analyse the legal position of a minor in a partnership firm.
(b) On what grounds can court dissolve a partnership firm? C. U. M.Com. 1944.
20. X is the sole owner of a firm. He admits Y as a partner on the following terms:—(1) Y is not to bring any capital (2) Y is not to be responsible for any loss. (3) Y is to receive Rs. 200/- p.m. in lieu of profits. (4) Y is to have all the powers of a partner. Discuss the legal position of Y. C. U. B.Com. 1936.
21. Can an infant be a partner? Can he be the shareholder of a company? If so, under what circumstances? What is the extent of his liability? C. U. B.Com. 1937.
22. How does partnership differ from co-ownership? What are the rights and liabilities of an infant in a firm? C. U. B.Com. 1938.
23. Under what circumstances and in what different ways is a trading firm dissolved compulsorily?
Can—(a) a partner of a firm on his own authority send a dispute relating to the firm to arbitration; (b) that partner acquire immovable property of the firm? (c) (i) a member of a limited company, (ii) a member of a firm, enter into a contract with (a) the company, (b) the firm? C. U. B.Com. 1941.
24. Describe the mutual rights and duties of partners. In what different ways can a firm be dissolved (a) with, (b) without the intervention of the courts. C. U. B.Com. 1943.
25. What are the rights and obligations of partners after dissolution of partnership? C. U. B.Com. 1932.
26. How far is it true to say that the law of partnership is a branch of the law of Principal and Agent? What liabilities, if any, has a person who holds himself out as a partner in regard to (a) his relations with the public; (b) the members of the partnership? C. U. B.Com. 1942.

CHAPTER IV

Company Law

1. Define a Private Company and show how it differs from a public Company. C.U. B.Com. 1925, 1935.
2. Distinguish between a "Public Company" and a "Private Company." C. U. B.Com. 1926.
3. Describe different classes of Public Companies. How would you distinguish between a private and a public incorporated company? C. U. B.Com. 1943.
4. How would you distinguish between a public company and a private company? How can a member of a company limited by shares transfer his shares? C. U. B.Com. 1944.
5. How can a Company reduce its share capital? C. U. B.Com. 1931.
6. How does a Public Company differ from a Private Company? Discuss the rights and liabilities of the Directors of a Joint Stock Company. C. U. B.Com. 1938.
7. Distinguish between a Private Company and a Public Company. Describe the duties of the Directors of a Public Company. C. U. B.Com. 1940.
8. How does a Private Company differ from a Public Company? Do you notice the distinction between voluntary liquidation and compulsory liquidation? What are the powers of the liquidator regarding payment of dividends to (a) creditors, (b) contributories. C. U. B.Com. 1942.
9. Can an infant be a shareholder of a Company? If so, under what circumstances? What is the extent of his liability? C. U. B.Com. 1937.
10. What do you mean by "Articles of Association" and "Memorandum of Association"? Can they be altered? If so, how? C. U. B.Com. 1939.
11. How would you distinguish between a Memorandum of Association and Articles of Association of a Limited Company? How can they be altered? C. U. B.Com. 1941, 1945.
12. What is a Memorandum of Association? How is it related to Articles of Association? Can a Company alter its Memorandum? If so, how? C. U. B.Com. 1937.
13. What is the Memorandum of Association? What is its relation to the Articles of Association? C. U. B.Com. 1929.
14. State the points of difference between the Memorandum of Association and the Articles of Association of a Limited Company. How can you alter Memorandum of Association? C. U. B.Com. 1931.

- 15 Distinguish between the Memorandum of Association and the Articles of Association. What procedure would you advise your client to adopt to amend both? C U BCom 1943, 1945
- 16 (a) State the extent to which the memorandum and the articles of a company can be altered, and the procedure for the purpose.
(b) Can a court make an order staying the proceedings after passing in order of winding up? C U MCom 1938
- 17 What are the Articles of Association of a Joint Stock Company? How far do these articles bind the company and the members thereof? C U BCom 1926
- 18 Define floating charge, mortgage debenture and dividend. P 192 and Miscellaneous C U BCom 1936
- 19 Distinguish between shares, debentures and debenture stock. C U BCom 1932
- 20 Distinguish between (a) Shares, (b) Debentures, (c) Debenture Stock. What are managing agents? How has their position been regulated by Statute? C U BCom 1938
- 21 Who are the managing agents of a Public Company? How do they differ from managers of such a Company? How are managing agents appointed? How are they removed? C U BCom 1940.
- 22 "Managing agents occupy an important place in the Company Law of India." Discuss fully. C U BCom 1944
- 23 Write a note on—Statutory Reports. C U BCom 1940, 1941
- 24 State as briefly as possible the various ways in which the capital of a Company is most frequently altered, and distinguish between Reduction and Diminution of capital. C U BCom 1927
- 25 What qualifications must the Directors of a Company possess? Is it possible for a Director to assign his office to (a) a fellow director, (b) a third person? How can a director be removed from his office? C U BCom 1944
- 26 How far is it true to say that the position of a director of a Limited Company is akin to that of trustees? C U BCom 1939 1945
- 27 What are the qualifications for the directorship of a public incorporated company? How can the director of a company be removed from office? C U BCom 1943
- 28 Discuss the legality or the validity of the following —
(a) A, a director of a Banking Corporation, takes loan of Rs. 50,000/- from the Bank (i) without security, (ii) on furnishing security.
(b) The directors of a Company ordered payment of dividends from out of the capital. Such payment is in accordance with the rules contained in the articles of the Company. C U BCom 1940.
- 29 Whose agent is (a) a Receiver appointed by the Court, (b) a Receiver appointed by debenture holder? Is either of them personally liable on the contracts he makes? C U BCom. 1927.

30. Distinguish between a Joint Stock Company and a Partnership. C. U. B.Com. 1939.
31. Define and distinguish between (a) a Company, (b) Corporation, (c) a partnership. C. U. B.Com. 1927.
32. How can a voluntary winding up of a Company be brought about? How is liquidator appointed in such winding up? C. U. B.Com. 1935.
33. When can you apply for the compulsory liquidation of a Company? C. U. B.Com. 1928.
34. What are the grounds for the compulsory liquidation of a Company? C. U. B.Com. 1930.
35. Under what circumstances will the Court compel winding up of a Company? C. U. B.Com. 1931.
36. Under what circumstances will Courts order winding up of a Company? C. U. B.Com. 1939, 1945.
37. When and how can you apply for the compulsory winding up of a Company? C. U. B.Com. 1932.
38. How can a Company be wound up? On what grounds can a shareholder file a petition for winding up? C. U. B.Com. 1933.
39. Explain the grounds on which the Court would consider it 'just and equitable' to wind up a company. Can the court order the winding up of a company if the majority of the members oppress the minority, or if one of the members of the company by reason of his vote, has an all-powerful hand in its management? C. U. M.Com. 1939.
40. (a) What part does a committee of inspection play in the compulsory winding up of a company under the Indian Company Law?
(b) Enumerate the restrictions placed on the formation and working of a banking company. C. U. M.Com. 1944.
41. When and how can the compulsory liquidation of a Limited Company be brought about? C. U. B.Com. 1934.
42. State the manner in which creditors can voluntarily wind up a company. C. U. M.Com. 1941.
43. Under what circumstances will a public incorporated company be wound up by the court? What are the functions of the Official Liquidator? C. U. B.Com. 1943.
44. In what different ways can a company be wound up according to the laws of India? C. U. B.Com. 1944.
45. What are the powers of a liquidator in (a) a compulsory liquidation, (b) voluntary liquidation? C. U. B.Com. 1937.
46. Discuss the rights of individual members of a public Company. Under what circumstances will such a Company be wound up by order of Court? What is the effect of such winding up? C. U. B.Com. 1941.

47. Explain the provisions of the Indian Company Law by which the interests of the shareholders are safeguarded against the directors and the managing agent of a Company? C. U. M.Com. 1942.
48. Is the issue of a prospectus compulsory on the part of a Company? Discuss the liability of the directors and promoters of a company for statements, omissions and concealment in a prospectus. C. U. M.Com. 1940.
49. (a) Discuss the requirements of a prospectus issued under the Indian Company Law. To what extent does the principle of *suppression veri* apply?
- (b) State the restrictions placed upon the allotment of a Company and explain the effect of irregular allotment. C. U. M.Com. 1943.

CHAPTER V

Negotiable Instruments

1. Who are the usual parties to a Bill of Exchange? Against what persons can a holder of a dishonoured bill maintain an action? C. U. B.Com 1926
2. Define (a) Special Indorsement, (b) Bottomry Bond, (c) Promissory Notes C. U. B.Com. 1927.
3. A, by means of a false pretence or by a promise or condition which he does not fulfil, induces B to draw a cheque in favour of C. A then delivers the cheque to C who receives it *bonafide* and for value. Does C acquire a title and can he sue either B or A upon the cheque? C U B.Com. 1927
4. Why are Bills of Exchange Promissory notes and cheques called "Negotiable Instruments"? C U B.Com. 1929
5. Distinguish between different kinds of "Negotiable Instruments" C U B.Com 1930
6. Write notes on—(a) Bill of Lading, (b) Bill of Exchange C U. B.Com 1939.
7. A gets hold of B's cheque book and forges B's name on a cheque. He obtains money from B's bankers by presenting the forged cheque and then disappears. Who bears the loss, B or the banker? C U. B.Com 1931
8. What is the position of a minor in the matter of Negotiable Instruments? C U. B.Com 1931
9. Examine the nature of pleas in the following cases—
 - (a) An acceptor of a bill, sued by a holder in due course, pleads that the payee is an infant
 - (b) A maker of a note sued by a holder in due course pleads that the payee could not indorse, as he was insolvent C U. M.Com. 1939
10. Can an acceptor—
 - (a) challenge the genuineness of an endorsed bill of exchange?
 - (b) be relieved from liability to a holder in due course if a bill of exchange is drawn in a fictitious name? C. U. M.Com 1940.
11. Explain the legal effect of (a) endorsement for part of the amount due on a negotiable instrument, (b) delivery by legal representative of a deceased person who had endorsed but not delivered a negotiable instrument. C. U. M.Com. 1941.
12. Explain—(a) A drawee in case of need, (b) a holder in due course. C. U. B.Com. 1931.

13. Explain—
 (a) A drawee in case of need.
 (b) A holder in due course.
 (c) Crossing of cheques. C. U. B.Com. 1928.
14. Who is a holder in due course? What are his rights? What are the rights of a holder who takes over a B/E after it has become due? C. U. B.Com. 1934.
15. (a) Discuss the rights of a transferee of a negotiable instrument made without consideration.
 (b) Explain the different ways in which an acceptor of a negotiable instrument is discharged from liability. C. U. M.Com. 1944
16. Distinguish between—
 (a) "Holder" and "Holder in due course"
 (b) "Bill of Exchange" and "Promissory Note." What are accommodation Bills? C. U. B.Com. 1938
17. How would you distinguish between—
 (a) a 'Holder' and a 'Holder in due course';
 (b) 'open cheques' and 'crossed cheques'?
 X draws a cheque for £10,000 on bank Y on 20th March, 1941. X has sufficient funds to his credit on that date. Bank Y fails on 20th April, 1941, before the cheque is presented. Advise the holder of the cheque as to his course of action. C. U. B.Com. 1942.
18. Write short notes on any four of the following :—
 (a) crystallization of a floating charge,
 (b) managing agents,
 (c) holder in due course,
 (d) inchoate instrument,
 (e) bills in sets. C. U. M.Com. 1941
19. State the effects of—(a) crossing a cheque generally, (b) crossing a cheque specially. C. U. B.Com. 1925.
20. C, the payee of a bill, indorses it in blank to D, who specially indorses it to E or order. E without indorsement, transfers the bill to F. From whom can F claim payment, and why? C. U. M.Com. 1938.
21. A draws a bill payable to his own order on B, who accepts it. A afterwards endorses it to C, C to D, and D to E. E brings a suit against B, C and D making them jointly liable for the money. Give your decision. C. U. M.Com. 1938.
22. Explain the position of an endorser of a negotiable instrument as compared with that of a drawer. Can a holder proceed against the endorser without impleading the acceptor or the drawer? C. U. M.Com. 1939.
23. Define a promissory note, and distinguish it from a Bill of Exchange. C. U. B.Com. 1933.
24. How can a holder of a negotiable instrument treat it either as a Bill of Exchange or as a Promissory note? C. U. B.Com. 1933.

25. (a) What are the rights exercised by a notary public in respect of a negotiable instrument ?
 (b) What are bills in sets ? Explain the effect of endorsing the different parts of a bill in favour of different persons C U M Com 1942
26. (a) Can a negotiable instrument be partially indorsed ?
 (b) State the consequences if the time limit allowed for the acceptance of a bill of exchange by the drawee is exceeded C U M Com 1943
- 27 Define a Promissory note and distinguish it from a Bill of Exchange Which of the following is a promissory note ? (1) 'I promise to pay B Rs 500 and all other sums which shall be due to him' (b) 'I acknowledge myself to be indebted to B for the sums of Rs 1,000 to be paid on demand for value received' C U B Com 1935
- 28 How would you distinguish between the liabilities of a maker of a promissory note and those of a drawer of a bill of exchange ? What do you mean by a holder in due course ? Describe his legal position C U B Com 1941
- 29 (a) When is the maker of a promissory note discharged from liability ? (b) A draws a cheque for Rs 1,000/- and when the cheque ought to be presented has funds at the bank to meet it The Bank fails before the cheque is presented Discuss the legal positions of the drawer the holder and the Bank C U B Com 1936
- 30 In what different ways an instrument may be dishonoured ? C U B Com 1939
- 31 When, how and to whom should the notice of dishonour of a Bill of Exchange be given ? C U B Com 1932
- 32 What is a Bill of Exchange ? Will the acceptor of a Bill of Exchange be bound if the indorsement is forged ? When is a bill said to be 'dishonoured' ? When is the notice of dishonour unnecessary ? C U B Com 1940.
- 33 When is the notice of dishonour unnecessary in the case of a Bill of Exchange ? C U B Com 1934
- 34 A draws a Bill of Exchange in favour of B Before its maturity it is burnt in B's house Has B any remedy against A ? C. U. B Com 1937
- 35 In what cases is presentment of a Bill of Exchange unnecessary ? C. U B Com 1935

CHAPTER VI

Law of Insolvency

1. On what grounds can you apply for adjudication of a person as an insolvent? C. U. B.Com. 1930.
2. Enumerate the "Acts of Insolvency", and state the exact effect of an order of discharge. C. U. B.Com. 1926, 1945.
3. What is an Act of Bankruptcy? What are the effects of adjudication? C. U. B.Com. 1928.
4. (a) What are the acts of insolvency? (b) How can you adjudicate your debtors? C. U. B.Com. 1933, 1945.
5. (a) What are the acts of insolvency? (b) When can a creditor apply for adjudication of his debtor. C. U. B.Com. 1934.
6. "A petition of insolvency can be made only when the debtor has committed an act of insolvency." Explain. What do you mean by a Protection Order? C. U. B.Com. 193.
7. Explain—
 - (a) Act of insolvency cannot be purged.
 - (b) Debts not payable in insolvency. C. U. M.Com. 1939.
8. (a) An Act of insolvency may be voluntary. Illustrate.
 (b) Can a firm as such commit an Act of insolvency? Is there any distinction between the English and the Indian Law on the subject. C. U. M.Com. 1940.
9. Illustrate the rule that the acts of insolvency are the creation of the statute.
 Can a foreigner be adjudged insolvent by a Court in British India. C. U. M.Com. 1943.
10. Describe what are called "Acts of Insolvency." What are "protected" transactions in insolvency law? C. U. B.Com. 1938.
11. What are acts of insolvency? What are the effects of an order of adjudication? C. U. B.Com. 1939.
12. Describe fully what constitutes Acts of Insolvency. What is the effect of an order of discharge on the insolvent? C. U. B.Com. 1941.
13. Discuss fully the effects of an order of adjudication. Enumerate and describe debts which are not provable in insolvency C. U. B.Com. 1940.
14. Can (a) an infant, (b) a married woman, (c) a resident alien be made a bankrupt? C. U. B.Com. 1931.
15. Explain the circumstances in which an Official Assignee may be appointed.

the possession of the latter Is there any exception to the general rule? C U MCom 1928

16. (a) What are the essentials of a fraudulent preference under the insolvency law?

(b) Explain the doctrine of relation back in respect of an insolvent's property C U MCom 1944

17. What constitutes 'fraudulent preference' in the law of insolvency? Can an order of discharge be revoked? If so under what circumstances? C U BCom 1937

18. What is a fraudulent preference? What is its effect on insolvency? C. U BCom 1932

19. What is an Act of Insolvency? What do you mean by Fraudulent Preference? What is the effect of Fraudulent Preference on Insolvency? C U BCom 1942

20. (a) Explain 'reputed ownership' and its application under Insolvency Law

(b) What are protected transactions according to Insolvency Law? C U MCom 1941

21. (a) When can the Court annul an order of adjudication passed in an insolvency matter?

(b) What debts and liabilities are not provable in insolvency? C U MCom 194

22. On what grounds would the Courts grant discharge to an insolvent? What do you mean by a "secured creditor"? Under what circumstances can he present a petition for adjudging a person insolvent? C U BCom 1944

CHAPTER VII

Arbitration

1. What is the effect of submission to arbitration on an action? C. U. B.Com. 1928, 1932.
2. Under what circumstances can the Court set aside the award of an arbitrator? C. U. B.Com. 1931.
3. What is a submission? On what grounds can you have a award set aside? C. U. B.Com. 1933.
4. What is meant by submission to arbitration? Can a joint Stock Company refer to arbitration any existing or future dispute between itself and another Company? C. U. B.Com. 1942.
5. Under what circumstances can the Courts (a) modify, (b) remit, (c) set aside an award made by an Arbitrator? C. U. B.Com. 1943.
6. (a) When can an award be remitted for the consideration of the same arbitrator?
(b) When can you have an award set aside? C. U. B.Com. 1934.
7. How would you describe the powers of arbitrators and umpires under the Indian Arbitration Act? Under what circumstances would the Courts (a) remit awards, (b) set aside awards? C. U. B.Com. 1944.
8. What is a submission to arbitration? What is the effect of a submission to arbitration on an action? C. U. B.Com. 1935.
9. Explain the nature and effect of 'submission' according to the Indian Arbitration Act. Is the Court's jurisdiction affected by the submission? C. U. B.Com. 1938.
10. Explain fully the nature of control the Court exercises over the proceedings of an arbitrator under the Indian Arbitration Act. When can an arbitrator under the Act state a special case for the opinion of the Court? C. U. M.Com. 1940.
11. State the different ways in which matter in dispute can be arbitrated according to the Indian Arbitration Act, 1940. What are the powers of the Court in the case of an arbitration commenced without its intervention? C. U. M.Com. 1942.
12. State briefly the manner in which the arbitration of a dispute may be made without the intervention of the Court. C. U. M.Com. 1939.
13. Briefly outline the powers the Court can exercise in a case of arbitration without intervention of the Court, under the Indian Arbitration Act. C. U. M.Com. 1944.
14. When can an award be set aside? When can a Court remove an arbitrator? C. U. B.Com. 1936.
15. What powers do Courts in British India enjoy over awards by arbitrator? C. U. B.Com. 1939, 1945.
16. Under what circumstances and on what grounds can Courts in British India exercise jurisdiction in cases of arbitration (a) under the Indian Arbitration Act, (b) under the Civil Procedure Code. C. U. B.Com. 1940.

CHAPTER VIII

Insurance

1. Define Insurance. C. U. B.Com. 1927.
2. What are the essential features of a contract of insurance? C. U. B.Com. 1925.
3. Define (a) Life insurance, (b) Marine insurance. Can you assign (a) Life policy, (b) Marine Insurance contract? If so, how? C. U. B.Com. 1931.
4. Explain the contract of Fire Insurance as a contract "Uberrimae fidei." C. U. B.Com. 1936.
5. (a) To what extent, if any, will concealment by the person insuring his life have the effect of avoiding the policy?
(b) Fire insurance, like Marine insurance, is a contract of indemnity. Explain. C. U. M.Com. 1938.
6. (a) Contracts of life insurance are not contracts of indemnity. Explain.
(b) A contract of Marine insurance is a contract based on the utmost good faith. Illustrate. C. U. M.Com. 1940.
7. (a) State the effect of misstatement in a Policy of life insurance.
(b) Explain the nature of distinction between a life and a Marine insurance. C. U. M.Com. 1942.
8. A contracts with B for a specified sum to sell a house in Calcutta which had been insured by A with the X Insurance Co. The contract contains no reference. After the date of the contract, but before the date fixed for its completion, the house is damaged by fire and A receives the insurance money from the Company. The purchase is afterwards completed and the purchase money agreed upon is paid without any abatement on account of the damage by fire. Advise the Insurance Co. as to their rights. C. U. B.Com. 1927.
9. Explain the following terms :—
(a) Endowment Policy; (b) Joint life Policy.
Are Life Policies and Fire Insurance Policies assignable? If so, how can such a policy or policies be assigned? C. U. B.Com. 1942.
10. Can a Fire insurance policy be transferred?
Illustrate the principle of contribution as applicable to an Insurance policy. C. U. B.Com. 1943.
11. 'Insurance is a contract on Speculation.' Discuss. C. U. B.Com. 1929-1937.
12. Explain—(a) Salvage; (b) Particular average. C. U. B.Com. 1929.
13. Write notes on—(a) Salvage, (b) Re-insurance. C. U. B.Com. 1937.

14. Distinguish between Re-insurance and Double Insurance. Can a marine insurance contract be assigned? C. U. B.Com. 1938.
15. Write notes on—(a) Superintendent of Insurance. (b) Insurance. (c) Reserve Bank of India. C. U. B.Com. 1939.
16. Write notes on—(a) Inspector of insurance. (b) Reserve Bank of India. C. U. B.Com. 1940.
17. In an insurance upon life, what is considered as insurable interest? Has the creditor an insurable interest in the life of his debtor, and father in that of his son? C. U. M.Com. 1939.
18. (a) What are 'Perils of the Sea' against which insurer guarantees in a case of marine insurance?
(b) Has the insurer any right in a case of insurance against fire, when after the insurer has paid the amount of loss, the assured receives otherwise compensation for the loss? C. U. M.Com. 1941.
19. (a) Illustrate the rule of *causa proxima* applicable to 'perils of the sea' against which the insurer guarantees, in a case of marine insurance
(b) A man insured his life for the benefit of his wife, and was subsequently convicted of having murdered her. Can the insurance money be recovered? C. U. M.Com. 1944.
20. Describe the statutory requirements regarding (a) capital, (b) deposits, (c) registration for carrying on new insurance business in British India. Under what circumstances will Courts order winding up of insurance companies? C. U. B.Com. 1941.

CHAPTER IX

Mortgage

1. Define—Hypothecation. C. U. B.Com. 1927.
2. What is an equitable mortgage? How can it be effected C. U. B.Com. 1934
3. Define and discuss the following :—
 - (a) Usufructuary mortgage ;
 - (b) English mortgage ;
 - (c) Mortgage by Conditional Sale. C. U. B.Com. 1935.
4. What is an Equitable Mortgage, and where can it be created C. U. B.Com. 1936
5. Write notes on—(a) Equitable mortgage, (b) The Reserve Bank of India, (c) Bill of Lading. C. U. B.Com. 1939.
6. Distinguish between a Pledge and a Mortgage. How can mortgage by deposit of title deeds be effected in British India C. U. B.Com. 1941.

CHAPTER X

Law Relating to Carriage of Goods.

- ✓ 1. Who are common carriers? What are their duties? In what extent do railways in India discharge the duties of carriers? C. U. B.Com. 1939, 1945.
 2. Write a short essay on the duties of a common carrier under Act III of 1865 C. U. M.Com. 1943
 3. Describe the peculiar legal position of railway companies in India as carriers. What do you understand by (a) risk note, (b) bill of lading? C. U. B.Com. 1941.
 - ✓ 4. Is Bill of Lading a Negotiable Instrument? C. U. B.Com. 1930
 5. Distinguish between a Charter-Party and a Bill of Lading. What are the warranties implied in a Charter-Party? C. U. B.Com. 1932.
 - ✓ 6. Distinguish between a Charter-Party and a Bill of Lading. C. B.Com. 1928, 1929, 1935.
 7. What is the purpose of a bill of Lading in a contract of affreightment? C. U. B.Com. 1933.
 8. (a) What is the purpose of a Bill of Lading in a contract of affreightment?
(b) What are the perils of the sea? C. U. B.Com. 1936.
 9. Write notes on—(a) Charter-Party, (b) Bill of Lading, (c) Salvage (d) Re-insurance. Write note on Charter-Party. C. U. B.Com. 1940, 1941, 1945.
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